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STATE OF MONTANA

Case Number: DA 22-0064

Exhibit 6

Nw. Corp. v. Dep't of Pub. Serv. Regul., No. DV 16-1236
(Mont. 13th Jud. Dist. Ct. July 29, 2018)

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5 MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

6 NORTHWESTERN CORPORATION,
7 d/b/a NORTHWESTERN ENERGY,

8 Plaintiff,

9 v.

10 THE MONTANA DEPARTMENT OF
11 PUBLIC SERVICE REGULATION,
12 MONTANA PUBLIC SERVICE
COMMISSION,

13 Defendant,

14 and

15 MONTANA ENVIRONMENTAL
16 INFORMATION CENTER, SIERRA CLUB,
and MONTANA CONSUMER COUNSEL,

17 Intervenor.

Cause No.: DV16-1236

Judge Rod Souza

ORDER AND MEMORANDUM ON
PLAINTIFF'S PETITION FOR JUDICIAL
REVIEW **AFFIRMING** THE PUBLIC
SERVICE COMMISSION'S DECISION

18 This matter comes before the Court on the Petition for Judicial Review of NorthWestern
19 Corporation d/b/a NorthWestern Energy (hereafter "NorthWestern.") [Dkt. 1.] NorthWestern's
20 petition challenges the Defendant Montana Public Service Commission (hereafter "the
21 Commission") disallowing charging consumers \$8.243 million for replacement power costs
22 from the 2013 outage of Colstrip Unit 4 (hereafter "CU #4") [Dkt. 1.] The petition also contests
23 the Commission denying modeling costs. [Dkt. 1.] The Commission's answer opposes
24

1 NorthWestern's contentions. [Dkt. 11.] The Court granted the Unopposed Motions to Intervene
2 of the Montana Environmental Information Center ("MEIC"), Sierra Club, and Montana
3 Consumer Council ("MCC.") [Dkts. 16-17.] These groups also oppose NorthWestern's
4 contentions. [Dkts. 28, 29.] The Court held oral argument on the petition on June 1, 2017. [Dkt.
5 36.] During the oral argument, NorthWestern announced it withdrew its challenge to the
6 Commission denying modeling costs.

7 **MEMORANDUM**

8 **FACTUAL BACKGROUND**

9 NorthWestern is one of five public utilities that own CU #4, a net 740-megawatt "coal-
10 fired generation station...in Colstrip, Montana" that started operating on December 15, 1985.
11 [Dkt. 25 at 3.] Westinghouse Electric Corporation now Siemens Energy (hereafter "Siemens")
12 built CU #4's generator and turbine. [Dkt. 25 at 3.] Talen Montana LLC (hereafter "Talen")
13 operates CU #4. [Dkt. 25 at 3.] In May 2013, Talen hired Siemens to perform a planned rotor
14 out-inspection. [Dkt. 25 at 4.] Siemens had "to remove the approximately 50-ton rotor from the
15 generator," reassemble the generator by reinserting the rotor via a skid pan, and install air gap
16 baffles. [Dkt. 25 at 4.] During the inspection, Siemens utilized an Electromagnetic Core
17 Imperfection Detector test ("El CiD test"). [Dkt. 25 at 4.] This test examines "generator cores
18 for potentially damaging shorts between laminations." [Dkt. 30 at 4.] Siemens performed El
19 CiD tests while the rotor was removed. [Dkt. 30 at 4.] El CiD tests were not performed after
20 rotor reinsertion/skid pan removal and air gap baffles installation. [Dkt. 30 at 4.] An El CiD test
21 takes around four hours, and the El CiD test in question was not prohibitively expensive. [Ex.
22 144 at 191:4-6, 228:4-8.]

1 After Siemens completed generator reassembly, CU #4 “returned to service on June 27,
2 2013.” [Dkt. 25 at 4.] On July 1, 2013, an unplanned outage of CU #4 began and lasted almost
3 seven months. [Dkt. 25 at 4.] In the outage’s aftermath, Talen hired Robert Ward (“Ward”) and
4 Ronald Halpern (“Halpern”) to conduct a Root Cause Analysis (“RCA”) for the outage. [Dkt.
5 30 at 4.] The RCA concluded “the outage [resulted from] a combination of inadequate
6 interlaminar Alkophos insulation of the generator’s core and damage to those laminations from
7 the...rotor, skid pan, or air gap baffles [reinstallation] during reassembly.” [*Id.*]
8 NorthWestern’s Petition for Judicial Review followed the Commission issuing a written order
9 after hearing on October 5 and 6, 2015 disallowing NorthWestern from charging customers for
10 the costs of replacement power during the CU #4 outage.

11 APPLICABLE LAW

12 “A district court reviews an administrative decision in a contested case to determine
13 whether the agency’s findings of fact are clearly erroneous and whether its interpretation of the
14 law is correct.” *Northwestern Corp. v. Mont. Dep’t of Pub. Serv. Regulation*, 2016 MT 239, ¶
15 25, 385 Mont. 33, 380 P.3d 787. “A finding of fact is clearly erroneous if it is not supported by
16 substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence,
17 or if a review of the record leaves the court with a definite and firm conviction that a mistake
18 has been made.” *Northwestern Corp.*, 2016 MT 239 at ¶ 26. “Substantial evidence is evidence
19 that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a
20 scintilla.” *Northwestern Corp.*, 2016 MT 239 at ¶ 27. “In reviewing findings of fact, the
21 question is not whether there is evidence to support different findings, but whether competent
22 substantial evidence supports the findings actually made.” *Id.* at ¶ 26. “[T]he court should give
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1 deference to an agency's evaluation of evidence insofar as the agency utilized its experience,
2 technical competence, and specialized knowledge in making that evaluation.” *Id.* at ¶ 27.

3 OUTLINE

4 For ease of reading, the Court will address NorthWestern’s challenges of the Commission’s
5 legal interpretations first. These challenges are:

- 6 • The Commission departed from precedent without explanation infringing *Waste Mgmt.*
7 and *Jicarilla*.
- 8 • The Commission improperly applied the prudence standard adopted in *NorthWestern*.
- 9 • The Commission improperly placed on NorthWestern the burden of persuasion for
10 prudence.
- 11 • The Commission improperly applied *AEP Texas*.
- 12 • The Commission incorrectly measured risk.
- 13 • The Commission improperly required corroborating evidence for testimony of
14 NorthWestern’s witnesses.

15 The Court will then address NorthWestern’s challenges to the Commission’s findings of fact

- 16 • The Commission’s findings on risk were erroneous.
- 17 • The Commission’s findings on outage insurance were erroneous.
- 18 • The Commission’s findings on NorthWestern not pursuing litigation with Talen or
19 Siemens were erroneous.
- 20 • Under Montana Supreme Court and federal circuit precedent, the Commission’s
21 findings were erroneous.

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23 ///

ANALYSIS

I. The Commission did not infringe *Waste Mgmt.* or the D.C. Circuit's jurisprudence.

NorthWestern asserts the Commission infringed *Waste Mgmt.* by not explaining why the Commission allowed replacement power costs for a 2009 CU # 4 outage, but not this outage. [Dkt. 25 at 16-17.] An agency must "either follow its own precedent or provide a reasoned analysis explaining its departure." *Waste Mgmt. Partners v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (Mont. 1997). NorthWestern Energy previously petitioned the Commission to allow replacement power cost for a 2009 CU #4 outage. *In re NorthWestern Energy's Application for Electric Supply Deferred Cost Account Balance and Projected Electric Supply Cost*, Docket ## D2008.5.45, D2009.5.62. Following a stipulation, the Commission concluded NorthWestern prudently incurred these costs and allowed NorthWestern to charge its customers for these costs. Docket ## D2008.5.45, D2009.5.62, Final Order #6921c at 35, 2010 Mont. PUC LEXIS 33 at *58.

The Ninety-Second Conclusion of Law in Final Order # 6921c, regarding the 2009 outage, states "[t]he Commission considers the stipulation's resolution of the [CU #4] lost revenue issue reasonable. The Commission cautions, however, that its approval of the stipulation's resolution of this issue is **not precedential** as to how the Commission may decide this issue in the future if it arises." 2010 Mont. PUC LEXIS 33 at *58 (emphasis added). Therefore, Final Order # 6291c is not precedential regarding allowing NorthWestern to charge customers for replacement power for a CU #4 outage. Accordingly, the order's absence from the Commission's findings and conclusions in this case did not infringe *Waste Mgmt.* Furthermore, the decision in Final Order #6921c accepted the parties' stipulation and was not the result of findings of facts and conclusions of law after presentation of contested evidence.

1 Federal circuit courts have expounded on the limits of requiring an agency to grapple
2 with its precedents. “An agency is by no means required to distinguish every precedent cited to
3 it by an aggrieved party.” *Jicarilla Apache Nation v. United States DOI*, 613 F.3d 1112, 1120
4 (D.C. Cir. 2010). As explained *supra*, Final Order #6 291c is not precedential. The D.C. Circuit
5 “permit[s] agency action to stand without elaborate explanation where distinctions between the
6 case under review and the asserted precedent are so plain that no inconsistency appears.” *Bush-*
7 *Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997). The “not
8 precedential” approval of the CU #4 outage stipulation in Final Order #6921c constitutes a
9 “plain” distinction revealing no inconsistency with the Commission’s decision regarding cost-
10 recovery for the 2013 CU #4 outage. Moreover, this case is unlike *Jicarilla* where the agency
11 engaged in disparate treatment of methods without explanation. *See* 613 F.3d at 1119, 1120.
12 Here both in Final Order # 6921c and this case, the prudence standard was applied.

13 **II. Other Commission applications of law are similarly correct.**

14 NorthWestern challenges the Commission’s application of the prudence standard in
15 assessing whether the replacement power costs were properly incurred. NorthWestern’s
16 arguments are framed in the context of a reasonable utility. In its reply, NorthWestern
17 acknowledges the prudence standard governs and that a reasonable utility standard is a factor in
18 prudence analysis. [Dkt. 35 at 11.] The Montana Supreme Court has rejected the reasonable
19 utility standard and expressly gave great deference to the Commission in evaluating prudence.
20 *Northwestern*, 2016 MT 239 at ¶ 36. “The Montana Legislature gave the Commission express
21 latitude to determine if the given costs were prudent—careful, sensible, practical, discreet,
22 wise, or farsighted or, more apt in the regulatory environment, avoiding unnecessary risks—
23 through its own fact finding and administrative authority.” *Northwestern Corp.*, 2016 MT 239
24

1 at ¶ 33. The Court reasoned “[i]f ‘prudent’ was restricted to what a reasonable utility would do
2 in similar circumstances, the Commission would be deprived of its own discretion to evaluate
3 and determine whether the utility's actions were prudent.” 2016 MT 239 at ¶ 36.

4 In *Northwestern*, immediately after recognizing a reasonable utility was an “appropriate
5 factor to consider,” the Court concluded the record supported the Commission’s decision. 2016
6 MT 239 at ¶ 38. As shown more fully *infra*, the Commission explained why the actions of a
7 reasonable utility were insufficient to conclude NorthWestern prudently incurred replacement
8 power costs from the CU #4 outage and substantial evidence and Montana law supports that
9 explanation. Moreover, NorthWestern’s arguments so heavily rely on what a reasonable utility
10 would do that accepting these arguments in this case would adopt the “reasonable utility”
11 standard rejected in *Northwestern*.

12 NorthWestern criticizes the Commission applying its own expertise in determining
13 NorthWestern’s imprudence. [Dkt. 25 at 25-27.] However, in rejecting the reasonable utility
14 standard to determine prudence, the Montana Supreme Court observed “[t]ying the outcome to
15 evidence of what other utilities did or would do would remove or reduce the discretion of the
16 Commission to rely on its own expertise.” *Northwestern Corp.*, 2016 MT 239 at ¶ 36.
17 Therefore, by using the prudence standard, the Commission correctly applied the law.

18 NorthWestern argues the Commission decision was legally incorrect because it did not
19 presume costs that a utility incurs are prudent. [Dkt. 25 at 29.] NorthWestern cites Justice
20 Brandeis’s concurring opinion in *Missouri ex rel. Southwestern Bell Telephone Co. v. Pub.*
21 *Serv. Com.*, 262 U.S. 276, 289, n. 1 (1922). [Dkt. 25 at 29 & f.n. 177.] First, a concurring
22 opinion of two Justices is not binding. Second, Justice Brandeis does not cite to authority
23 supporting the presumption and uses the permissive “may”, not the mandatory ‘must’ or ‘shall.’

1 See *id.* Third, the concurrence analyzed “whether a prescribed rate is confiscatory,” 262 U.S. at
2 289. NorthWestern has not argued the Commission’s denial of replacement power costs for CU
3 #4’s outage confiscates NorthWestern’s property. [See Dkt. 1.]

4 NorthWestern also cites *West Ohio Gas Co. v. Pub. Utilities Com.*, 294 U.S. 63, 72
5 (1935). [Dkt. 25 at 29, f.n. 177.] However, in *West Ohio*, the Supreme Court differentiated the
6 role of a commission and a court. *Id.* at 74. “A court passing upon a challenge to the validity of
7 statutory rates does not determine the rates to be adopted as a substitute.” *Id.* Instead, the Court
8 examines whether the rates are so inadequate as to constitute confiscation. *Id.* Again,
9 NorthWestern’s Petition does not argue denial of authorization to charge customers for the cost
10 of replacement power from the CU #4 outage confiscates NorthWestern’s property.

11 NorthWestern utilizes the presumption to argue the Commission misapplied the law at
12 COL No. 94 by concluding NorthWestern had the burden of persuasion regarding prudence.
13 [Dkt. 25 at 30 & f.n. 182.] However, Admin R. Mont. 38.5.8220(2) and 38.5.8213(1)(i)
14 recognize the utility’s burden of proof regarding prudence. “[T]he burden of proof is a party’s
15 duty to prove a disputed assertion or charge and includes both the *burden of persuasion* and the
16 *burden of production*.”) *State v. Chaussee*, 2011 MT 203, ¶ 12, f.n. 2, 361 Mont. 433, 259 P.3d
17 783 (internal emphasis included, internal brackets, quotation marks, and parentheses omitted).
18 Therefore, the Ninety-Fourth Conclusion of Law correctly states Montana law.

19 Additionally, the Minnesota Supreme Court held “enactment of Minn. Stat. § 216B.16,
20 subd. 4 (1986) effectively removed” the presumption in *Southwestern Bell* and *West Ohio*, if it
21 ever existed in Minnesota. *In re Petition of N. States Power Co.*, 416 N.W.2d 719, 726 (Minn.
22 1987). Minn. Stat. § 216B.16, subd. 4 states “[t]he burden of proof to show that the rate change
23 is just and reasonable shall be upon the public utility seeking the change.” Therefore, the
24

1 Minnesota Supreme Court has concluded a statute giving the utility the burden of proof
2 eliminates a presumption. As shown *supra*, two Administrative Rules of Montana give the
3 utility the burden of proof regarding prudence. Thus, *N. States Power* is further authority that it
4 was correct for the Commission not to apply the presumption.

5 Among the decisions NorthWestern cites in reply is *Pub. Serv. Comm'n v. Ely Light &*
6 *Power Co.*, 393 P.2d 305, 324 (Nev. 1964). [Dkt. 35 at 19 & f.n. 93-98.] "In the absence of an
7 abuse of discretion on the part of the utility and in the absence of showing lack of good faith,
8 inefficiency or improvidence...the commission should not substitute its judgment for that of
9 management." 393 P.2d at 311. However, the Montana Supreme Court has long recognized the
10 Commission is unique. *Cascade County Consumers Ass'n v. Public Serv. Comm'n*, 144 Mont.
11 169, 191-92, 394 P.2d 856 (Mont. 1964). *Ely Light* does not recognize the statement in
12 *Northwestern supra* that that the Commission has expertise. Furthermore, in *Potomac*, the
13 prudence presumption was questioned when in conflict with statutory authority. *Potomac Elec.*
14 *Power Co. v. Public Serv. Comm'n.*, 661 A.2d 131, 140-41 (D.C. Ct. App. 1995). Like
15 *Potomac*, Montana's Administrative Rules put the burden on Northwestern.

16 **A. *AEP Texas*, a decision the Commission cites, accurately applied precedent, and**
17 **the decision does not require a link between the vendor's imprudence and the**
utility's actions before vendor imprudence is imputed to the utility.

18 NorthWestern challenges FoF No. 67 that says "NorthWestern outsourced these
19 responsibilities to Talen and Siemens, and then failed to provide witness testimony from these
20 entities to support its claim that the maintenance procedure that led to the outage was
21 performed prudently." [Dkt. 25 at 31.] FoF No. 67 subsequently cites *AEP Tex. Cent. Co. v.*
22 *PUC*, 286 S.W.3d 450, 467-70 (Tex. App. 2008) for support. NorthWestern's brief implies that
23 *AEP Tex.* is legally erroneous because it applied a 1988 decision of the Texas Public Utilities
24

1 Commission ("PUC"), instead of the 1991 Texas PUC decision, *Application of Texas Utilities*
2 *Electric Company for Authority to Change Rates*, Docket No. 9300, 1991 Tex. PUC LEXIS
3 279, 1991 WL 790285. [Dkt. 25 at 31 & f.n. 191-192.]

4 However, *AEP Tex.* cited the 1991 decision as authority to state "[u]nder Commission
5 precedent, costs incurred due to the imprudence of a third-party vendor are not reasonable and
6 necessary...The imprudence of a third-party vendor may be imputed to the utility, even if the
7 utility has not acted imprudently." 286 S.W.3d 468-69 & f.n. 20-21 (citing 1991 WL 790285, at
8 *473, Conclusion of Law No. 34 (Sept. 27, 1991)). Moreover, Conclusion of Law No. 34 states
9 "[r]egardless of a utility's prudent conduct, a vendor's imprudence is imputed to the utility
10 because ratepayers should not bear the responsibility of the vendor's imprudence." 1991 Tex.
11 PUC LEXIS 279 at part 11, *136-*137.

12 In challenging the Commission's use of *AEP Tex.*, NorthWestern asserts the 1991 PUC
13 decision "held...there needed to be a connection between the vendor's conduct and the utility's
14 conduct...to impute [the vendor's] impruden[ce] to the utility." [Dkt. 25 at 31.] The Court
15 cannot agree. Pages 112 and 113 of part 3 of 1991 Tex. PUC LEXIS 279 states "[t]here is no
16 evidence, however, establishing any link between Transamerica DeLaval's imprudent conduct
17 and TU Electric's conduct." Furthermore, Conclusion of Law No. 34 in *AEP Tex.* does not state
18 a connection is needed before a vendor's imprudence can be imputed to the utility. The Texas
19 PUC is not the only public service commission to liberally impute a vendor's imprudence to the
20 utility. The Pennsylvania Public Utility Commission has opined "[r]espondent's ratepayers
21 should not be made to bear the burden of the costs of replacing the malfunctioning steam
22 valves, for it was the respondent, not its ratepayers, which selected the contractor to provide the
23 valves and respondent and stockholders should bear the risk of performance failure." *Outage at*
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1 *the Salem Nuclear Generating Station*, 1985 Pa. PUC LEXIS 29 at *15, *95 (Pa. P.U.C.)
2 (quoting *Pennsylvania Public Utility Commission v. Metropolitan Edison Company*, 28 PUR
3 4th 555, 562-63 (Pa. P.U.C. 1979)).

4 **B. The Order cites *AEP Tex.* as authority for NorthWestern having the burden to**
5 **show prudent oversight of its independent contractors, not as authority to**
6 **impute Talen's or Siemens' imprudence to NorthWestern.**

7 NorthWestern tries to distinguish *AEP Texas* by observing the lack of evidence that
8 Talen was imprudent, generally discussing the RCA which stated Talen was not imprudent, and
9 noting the Commission cited the RCA earlier in its order. [Dkt. 25 at 32.] FoF No. 34 recounts
10 "MEIC[']s observ[ation] that...the [RCA] did not find Talen negligent or imprudent
11 [regarding] the core damage that occurred during the generator overhaul." Nevertheless, FoF
12 No. 34 says the analysis was silent regarding Siemens' negligence or imprudence.
13 NorthWestern proceeds to argue the Commission's reasoning means "Talen's prudent conduct
14 should be imputed to NorthWestern." [Dkt. 25 at 32.] However, this line of argument misstates
15 the Commission's purpose in citing *AEP Tex.* NorthWestern's brief does not address the
16 statement from FoF No. 67 that reads "NorthWestern may be able to delegate the operation of
17 its property to a contractor, but it cannot outsource its statutory and regulatory obligations as a
18 public utility to prove the prudence of costs resulting from [its] property's failure." Thus, the
19 Commission found NorthWestern did not satisfy its burden of proof about prudence, not that
20 Talen's or Siemens' imprudence was imputed to NorthWestern.

21 **C. While NorthWestern cites the Michigan PSC, Michigan PSC precedent shows**
22 **the PSC's legal analysis whether NorthWestern's oversight of Talen and**
23 **Siemens was prudent was correct.**

24 In challenging the Commission citing *AEP Texas*, NorthWestern cites *In re Consumers*
25 *Power Co.*, 84 P.U.R.4th 389, 399 (Mich. P.S.C. 1987) for the idea a vendor's mistake does not

1 mean a utility was imprudent. [Dkt. 25 at 31, f.n. 192.] However, the Michigan P.S.C. places
2 the burden of proof on the utility to show prudence in the context of independent contractor
3 performance. *In re Consumers Power Co.*, 1986, 1988 Mich. PSC LEXIS 378 at *34 (Mich.
4 Pub. Serv. Com. 1988) (The utility “did not show that the company properly performed its duty
5 to select and monitor the performance of independent contractors.”) Moreover, in the 1987
6 *Consumers Power* decision, the Michigan P.S.C. evaluated whether the utility was reasonable
7 and prudent in selecting and monitoring independent contractor performance. 1987 Mich. PSC
8 LEXIS 627 at *25. Therefore, it was not error for the Commission to evaluate the prudence of
9 NorthWestern’s oversight of its independent contractors Talen and Siemens in determining
10 whether NorthWestern was prudent or to place the burden of proof on NorthWestern.

11 **D. Substantial evidence supports the Commission’s factual analysis of prudence in**
12 **the context of oversight of Talen and Siemens.**

13 While NorthWestern criticizes the Commission’s reliance on *AEP Texas*, NorthWestern
14 does not challenge the Findings of Fact regarding NorthWestern’s imprudent oversight of Talen
15 and Siemens. FoF No. 67 states “Barnes admitted [playing] a minimal role in overseeing the
16 CU [#]4 outage work. For example, he did not read the daily outage reports that the plant
17 operator sent to him., which relayed the El Cid test results.” The Order cites 273:22-274:3 of
18 the hearing transcript to support these sentences. Barnes is NorthWestern’s Superintendent of
19 Joint Owned Operations. [Ex. 144 at 199:17-23.] Barnes testified he did not read their results,
20 and the question referenced “the daily outage reports that relayed information about the
21 particular El CiD tests that were going on.” [Ex. 144 at 273:22-25.]

22 Another unchallenged sentence from FoF No. 67 states “[w]hen asked whether he made
23 any suggestions to the plant operator about doing supplementary due diligence during the
24 outage [Barnes] said he did not, explaining, ‘I [would] be disagreeing with the very entity who

1 is charged with...responsibility of doing that prudently.” The Order cites lines 12-14 of page
2 274 of the hearing transcript to support these sentences. Barnes testified he “did [not] call them
3 back and say I disagree or anything with what [Talen is] doing. I mean, I [would be]
4 disagreeing with the very entity who is charged with the responsibility of doing that prudently.”
5 [Ex. 144 at 274:12-14.] Therefore, substantial evidence supports FoF No. 67 recitations of
6 Barnes’ testimony and the Commission’s extrapolation from that testimony to find
7 NorthWestern’s oversight of Siemens and Talen imprudent.

8 The Court cannot reweigh evidence after concluding substantial, credible evidence
9 supports a finding of fact. *America's Best Contrs., Inc. v. Singh*, 2014 MT 70, ¶ 31, 374 Mont.
10 254, 321 P.3d 95. Nevertheless, NorthWestern cites the testimony of the RCA, Halpern, Ward,
11 and Mont. Code Ann. § 26-1-301 to demonstrate prudence. [Dkt. 25 at 32.] Halpern is the
12 President and sole employee of Generator Consulting Services who appeared on
13 NorthWestern’s behalf and conducted the RCA. [Ex. 144 at 141:12-24, 145:16-25.] Mont.
14 Code Ann. § 26-1-301 states “[t]he direct evidence of one witness who is entitled to full credit
15 is sufficient for proof of any fact, except perjury and treason.” Nevertheless, “[t]he
16 Commission, of course, is always free to weigh any...information [the utility provides] against
17 any information to the contrary presented by other agencies or its own staff.” *In re Montana*
18 *Power Co.*, 180 Mont. 385, 400, 590 P.2d 1140, 1149 (Mont. 1979).

19 The Commission explained why the RCA was insufficient to show NorthWestern
20 reasonably and prudently oversaw CU #4 plant operations and maintenance. [FOF No. 68.] FoF
21 No. 68 also states an employee of another co-owner of CU #4 appeared to criticize the RCA as
22 inconclusive. NorthWestern does not challenge this sentence, and Barnes’ testimony states
23 “Steve Quennoz from PGE deems it inconclusive and says he needs a conclusive root cause by
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1 January 2014 for reporting purposes.” [Ex. 144 at 278:3-17.] Thus, substantial evidence
2 supports FoF No. 68. Finally, under NorthWestern’s reasoning, the Commission had to accept
3 all of the RCA or none of it. The Montana Supreme Court has rejected this idea. *See State v.*
4 *Shields*, 2005 MT 249, ¶ 30, 328 Mont. 509, 122 P.3d 421.

5 NorthWestern contends the Commission erred by “faulting NorthWestern for not
6 presenting a witness from Talen or Siemens.” [Dkt. 25 at 32.] Halpern stated his knowledge
7 that the core of CU #4 was tested and its insulation acceptable during prior outages was “based
8 on verbal conversations...with Eric Petritz” of Talen. [Ex. 144 at 173:1-13, 174:13-20.]
9 Halpern described Petritz as “probably in charge of the outage, or above the person in charge of
10 the outage” and “the most knowledgeable person.” [Ex. 144 at 174:22-25, 175:3-6.] Petritz was
11 not a witness at the hearing, and Halpern recounted to the Commission what Petritz told him.
12 [Id. at 175:7-10.] Therefore, the Commission did not err in discounting this testimony for lack
13 of a Siemens or Talen witness. “The law makes no distinction in weighing evidence between
14 expert testimony and evidence of other character. It is for the trier of the facts to determine the
15 weight to be given to any evidence.” *Weakley v. Cook*, 126 Mont. 332, 336, 249 P.2d 926, 928
16 (Mont. 1952).

17 **III. Applying Montana Supreme Court, federal, or state and federal regulatory**
18 **precedent, it was correct for the Commission to measure risk using the probability**
and cost standard.

19 NorthWestern argues the Commission’s analysis of risk is conjecture. [Dkt. 25 at 21.]
20 “Although the statistical probability of damaging the core during reassembly of the rotor may
21 be very low, this does not imply that the risk is in fact low, because risk, in this instance, is an
22 amalgam of probability and cost.” [FOF No. 52.] Montana law measures risk by weighing the
23 cost of the resulting harm and its probability in a variety of contexts. For example, regarding an
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1 employer reasonably accommodating an employee, “[i]ndependent assessment of the risk of
2 substantial harm is evaluation by the employer of the probability and severity of potential
3 injury in the circumstances.” *Reeves v. Dairy Queen*, 1998 MT 13, ¶ 42, 287 Mont. 196, 953
4 P.2d 703 (quoting Admin. R. Mont. 24.9.606(8)). Two of the three elements of assumption of
5 risk in a strict liability case are “realizing the existence of the defect or danger” and
6 “perceiv[ing] and appreciat[ing] the risk involved, *i.e.*, the probability of harm.” *Brown v.*
7 *North Am. Mfg. Co.*, 176 Mont. 98, 111, 576 P.2d 711, 719 (Mont. 1978).

8 “As the common law of torts long ago recognized, the rational calculation of risk
9 requires multiplying the magnitude of a threatened loss by the probability of its occurrence.”
10 *Arrendondo v. Neven*, 763 F.3d 1122, 1131 (9th Cir. 2014). California state and federal courts
11 have applied these principles to a utility company’s duty of care. *See, e.g., Tesoro Ref. & Mktg.*
12 *Co. Llc v. Pac. Gas & Elec. Co.*, 2016 U.S. Dist. LEXIS 5030, *54-*57 (N.D. Cal.). The
13 Nuclear Regulatory Commission defines risk “as the probability of the occurrence of a given
14 event multiplied by the consequences of that event.” *In Re Entergy Nuclear Generation Co.*
15 (Pilgrim Nuclear Power Station), 71 N.R.C. 449, 475, f.n. 147 (Nuclear Reg. Com. 2010).

16 Other state PSCs have used probability and magnitude of harm to measure risk. For
17 example, the Ohio Public Utilities Commission stated “Duke ignores the fact that risk is
18 composed of two elements: the probability of occurrence and the magnitude of the
19 consequences of such an occurrence.” *In re Application of Duke Energy Ohio, Inc.*, 2017 Ohio
20 PUC LEXIS 438 at *27. The Maine Public Utilities Commission said “[f]or example, a utility
21 could make a benefit/cost demonstration by comparing the risk (*i.e.* probability of failure times
22 cost of failure) of not addressing the criteria violation compared to the cost (and reduced risk of
23 system failure) of addressing the need identified by testing beyond the safe harbor.”

1 *Investigation into Maine Electric Utilities Transmission Planning Standards and Criteria*, 2013
2 Me. PUC LEXIS 67 at *49.

3 **IV. Substantial evidence supports the PSC's characterization of the source of the risk.**

4 NorthWestern argues Halpern's testimony does not support the Commission's analysis
5 of risk. [Dkt. 25 at 21.] FOF No. 52 says "NorthWestern acknowledged the risk associated with
6 rotor-out maintenance, noting that this risk is one reason for an observed increase in the time
7 period between major generator maintenance events in the industry." The Commission cited
8 Hr'g Tr. 154:16-25, Halpern's testimony, as authority for the statement. One of the reasons for
9 extending "the interval between major maintenance events" "was the risk associated with rotor
10 out inspection and maintenance." [Ex. 144 at 154:8-11, 154:16-20.] Halpern also saw that he
11 said upon removal and reinstallation of the rotor "there [is] a risk that it can bump the core and
12 it can damage the interlaminar insulation." [*Id.* at 154:21-25.] Therefore, Halpern's testimony
13 acknowledged rotor-out maintenance involved significant risk, and substantial evidence
14 supports FoF No. 52.

15 The first sentence FoF No. 53 states "[t]he source of the risk is well-known:
16 reassembling the generator requires inserting a 50[-] ton generator rotor into the cylinder within
17 the core with only an inch or two clearance." [FOF No. 53.] Authority for that statement is
18 178:19-20 of the Hearing Transcript. Halpern testified "you [are] putting in a 50-ton rotor into a
19 small whole (sic) with about an inch or two gap. If the crane fails, or something happens, it
20 drops and you can damage the core," and the question referenced installation. [Ex. 144 at
21 178:12-16, 19-22.] Thus, substantial evidence supports the Commission's characterization of
22 generator reassembly as inserting a sizeable rotor with a margin of error of only 1-2 inches.
23 FoF 53 then says "[a] slight shift in the position of the rotor can damage the core without
24

1 maintenance personnel even knowing.” [FOF No. 53.] Authority for this statement is 178:17-25
2 of the hearing transcript. These lines are also Halpern’s testimony. Halpern preceded his
3 statement about a small hole and a two-inch gap with “sometimes you do [not] know” that
4 damage happened. [Ex.144 at 178:17-19.] Thus, substantial evidence supports the
5 Commission’s finding that core damage can occur without maintenance’s knowledge.
6 Moreover, a gap of 1-2 inches is sufficiently small to constitute substantial evidence that core
7 damage can occur with only a slight shift in the rotor’s position. The precise nature of the task
8 obviously demonstrates risk. Risk is further increased where a slight shift in the 50-ton object’s
9 position can cause core damage that maintenance personnel would not know of.

10 NorthWestern’s brief objects to hindsight determining prudence. [Dkt. 25 at 21-22.] The
11 alleged hindsight was the Commission using the millions of dollars of damage from not
12 performing another El-CiD test in its risk analysis. *Id.* The Commission’s risk analysis also
13 cites the effect CU #4’s outage on Northwestern customers, incremental replacement power
14 costs of \$8.243 million. [FoF No. 53.] The Court disagrees that the Commission used hindsight
15 to measure risk. CU #4’s outage is far from the first instance that an outage led to enormous
16 replacement power costs. One example is the 2009 outage of CU #4 resulting in the stipulation
17 discussed *supra*. In *Northwestern*, the Montana Supreme Court stated “the outage caused
18 NorthWestern to incur an additional \$1,419,427 in charges to Powerex and Avista for
19 regulation service.” 2016 MT 239 at ¶ 9. Outside of Montana, the Maryland Public Service said
20 that, at least since 1981, Baltimore Gas and Electric was on notice about consequences of “high
21 costs associated with replacement energy when a nuclear power plant is out of service.” *In Re*
22 *Balt. Gas & Electric Co. App.*, 1989 Md. PSC LEXIS 85 at *25.

1 The Commission used the presence of consequential damage provisions to corroborate
2 its finding of significant risk in rotor-out maintenance. [FoF No. 52.] FoF No. 52 cites FoF No.
3 42 for support. FoF No. 42 says “[a]ccording to NorthWestern, the risk to vendors and
4 contractors of consequential damages is potentially unlimited and if vendors and contractors
5 were required to absorb that risk[,] the price of their services would contain a substantial
6 contingency to mitigate their exposure. Therefore, waivers of consequential damages generally
7 reduce costs for the plant owners.” NorthWestern does not challenge FoF Nos. 52 or 42.
8 “[P]otentially unlimited” risk and a cost reduction from “mitigat[ing] exposure” support the
9 Commission’s analysis of risk.

10 Courts have also examined consequential damages in the utility context. *See Ebasco*
11 *Services, Inc. v. Pennsylvania Power & Light Co.*, 460 F. Supp. 163 (E.D. Pa. 1978)
12 (recognizing suppliers will not take on liability for consequential damages, including
13 replacement power costs, caused by outages as the financial risk of these outages is too great).
14 Thirty years ago, the District of New Hampshire described contractual provisions eliminating
15 consequential damages as “not unusual in the power industry.” *Public Service Co. v.*
16 *Westinghouse Electric Corp.*, 685 F. Supp. 1281, 1289 (D.N.H. 1988). Therefore, the
17 Commission’s consequential damages analysis is further substantial evidence for its analysis of
18 risk.

19 The Commission also determined standard industry practice of not performing another
20 El CiD test after rotor insertion into the core was unpersuasive because NorthWestern’s
21 representations were conclusory and lacked evidentiary support in industry technical manuals.
22 [FOF No. 54.] NorthWestern argues this finding is legally incorrect and cites Mont. Code Ann.
23 § 26-1-302, which states “[a] witness is presumed to speak the truth.” [Dkt. 25 at 26 & f.n.
24

1 162.] However, witnesses Ward and Barnes testified another El-CiD test could have been
2 performed, would have taken four hours, and was not cost prohibitive. [Ex. 144 at 191:4-6;
3 228:4-8.] Finally, NorthWestern quotes Ward's answer that he did not "think so" when asked if
4 a pre-air gap baffles re-installation El CiD test could have averted the outage. [Dkt. 25 at 21,
5 f.n. 135.] This is risk justification that the Montana Supreme Court rejected in Northwestern.
6 See 2016 MT 239 at ¶ 38. The time to analyze the efficacy of another El CiD test was before
7 the outage.

8 **V. In assessing risk, the Commission did not misapprehend the effect of evidence.**

9 NorthWestern contends the Commission's risk analysis misapprehended the effect of
10 evidence because the Commission mistook a possible risk for a risk sufficiently substantial to
11 require mitigation. [Dkt. 25 at 22.] However, as shown in § IV *supra*, the record supports the
12 Commission's characterization of risk. Therefore, the Commission has not misapprehended the
13 effect of evidence.

14 NorthWestern states "damage to generator cores from rotor reinsertion is low." [Dkt. 25
15 at 22-23.] Once again though, risk is a dynamic equation balancing the cost of mitigation
16 against the consequences of failure. The Commission recognized this because FOF No. 52
17 states "[a]lthough the statistical probability of damaging the core during reassembly of the rotor
18 may be very low, this does not imply that the risk is in fact low, because risk, in this instance, is
19 an amalgam of probability and cost." Furthermore, FoF No. 53 states "[v]ery, very low
20 probability...is no consolation to NorthWestern ratepayers when they experience \$8.243
21 million in...replacement power costs [and] regular fixed plant costs of approximately \$21
22 million" when CU #4 was down. Thus, NorthWestern is really arguing the low probability of
23 harm dwarfs the high cost of harm and reveals the risk is low. The Court cannot reweigh
24

evidence upon “determin[ing] substantial credible evidence exists to support the findings of the trier of fact.” *Benjamin v. Anderson*, 2005 MT 123, ¶ 37, 327 Mont. 173, 112 P.3d 1039. Furthermore, the Commission did not just weigh cost of harm against probability. The Commission also evaluated the efficacy of another El-CiD test with FoF No. 54 stating the test should have been performed “[s]ince such a test is neither prohibitively expensive, nor time consuming and could detect potentially catastrophic core damage that might otherwise go unnoticed.” Ward testified an El CiD test takes around four hours. [Ex. 144 at 191:4-6.] Barnes answered “[y]es” when asked “presumably, this second El CiD test has [not] been found to be prohibitively expensive.” [Ex. 144 at 228:4-8.] Furthermore, Halpern testified “And I don’t know even now what would have been done differently, except an additional El CiD test.” [Ex. 144 at 182:20-21.] Additionally, Talen is now doing these tests; demonstrating they can be done in a cost-effective manner.

Therefore, substantial evidence supports FoF No. 54. The Second Circuit’s third criterion in evaluating risk is “the burden of adequate precautions.” *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) Accordingly it was legally correct for FoF No. 54 to assess the efficacy of another El CiD test.

VI. *Northwestern* instructs the Commission correctly found NorthWestern imprudent for evaluating outage insurance only after the CU #4 outage occurred.

FoF No. 62 found NorthWestern imprudent for not evaluating outage insurance’s availability and cost until after the outage took place. NorthWestern condemns this finding as “illogical.” [Dkt. 25 at 28.] The Court disagrees. Binding precedent instructs this finding is correct. Prudence is not shown when a utility embarks upon “[r]isk justification, not risk management.” *NorthWestern*, 2016 MT 239 at ¶ 38. NorthWestern appraising outage insurance’s availability and cost after the outage took place is risk justification. NorthWestern

1 argues CU #4's operating history did not sufficiently apprise it of possible future generator core
2 outages. [Dkt. 25 at 24.] This authorizes the risk justification *Northwestern* rejects because it
3 means only after an outage occurs, when it is too late to buy outage insurance, is it prudent to
4 evaluate outage insurance. NorthWestern also cites the other CU #4 owners lacking outage
5 insurance. [Dkt. 25 at 24.] This does not vitiate NorthWestern's risk justification, and as
6 recounted *supra*, the reasonable utility does not determine prudence. NorthWestern cites the
7 cost and cost-ineffectiveness of outage insurance. [Dkt. 25 at 24.] However, after
8 acknowledging insurance costs have risen, the New Hampshire Public Service Commission
9 stated "[n]otwithstanding the cost issue, we believe it prudent for the Company to investigate
10 whether coverage is available." *In re White Rock Water Co., Inc.* 2002 N.H. PUC LEXIS 118 at
11 *9-*10.

12 NorthWestern argues the Commission misapprehended the effect of Mr. Lyon's
13 testimony regarding the prudence of a utility like NorthWestern investigating outage insurance.
14 [Dkt. 25 at 23.] In FoF No. 62, the Commission clearly understood Mr. Lyon's testimony.
15 "Independent owned projects have outage insurance because there is no one else to fall back
16 upon to make up revenues in the event of an outage." [FoF No. 62.] Lyons answered "[i]n part"
17 when asked "[s]o investor-owned utilities do [not] have that same incentive [to obtain
18 insurance] in part, because they [have] access to ratepayers in a way that independent power
19 producers don't." [Ex. 144 at 104:16-105:21.]

20 Also, while recognizing Mr. Lyon's distinction between private and regulated utilities
21 and the likelihood of insurance purchases, the Commission simply found NorthWestern did not
22 investigate outage insurance. "NorthWestern did not even bother to look at the availability and
23 cost of outage insurance." [FoF No. 62.] Further, the Commission found that NorthWestern's
24

1 actions constituted risk justification disapproved of in *Northwestern* and the A.R.M.s. [FoF.
2 No. 63.]

3 Finally, Northwestern criticizes the Commission for dismissing Barnes' testimony about
4 other utilities not buying insurance for lack of corroborating affidavits. [Dkt. 25 at 28.]
5 However, the Commission noting the absence of these affidavits "or other documentation" is in
6 FoF No. 39, in the section of the order summarizing the parties' positions. The Commission's
7 decision on the insurance issue did not give little weight to this testimony for lack of affidavits
8 or other documentation. [See FoF. 62.] Instead it gave little weight to this testimony because
9 NorthWestern's insurance analysis was after the fact, i.e. risk justification. [FoF No. 62.]

10 **VII. Substantial evidence supports the Commission's finding that NorthWestern was**
11 **imprudent in not considering pursuing litigation against Talen or Siemens for the**
cost of replacement power.

12 FoF No. 72 says "[b]ecause NorthWestern failed to show that it timely evaluated
13 alternatives to recovering replacement costs from customers it has not meet its burden of proof"
14 to show prudence. The alternative specifically contested was NorthWestern suing Siemens or
15 Talen. [Dkt. 25 at 32-33.] NorthWestern first argues FoF No. 72 erred in citing Admin. R.
16 Mont. 38.5.8201(3) because the rule does not require NorthWestern to consider all possible
17 means of recovering replacement costs before charging rate-payers for these costs. [Dkt. 25 at
18 33.] However, the Commission did not cite Admin. R. Mont. 38.5.8201(3) for this purpose. It
19 cited the rule to support the combination of FoF Nos. 70 and 71 that state NorthWestern
20 repeatedly stated in pre-hearing discovery that it had not determined whether to pursue legal
21 action only to assert during the hearing "it had no viable cause of action." Admin. R. Mont.
22 38.5.8201(3) states "[a] utility should thoroughly document its ...management decision-making
23 so that it can fully demonstrate to the commission and stakeholders the prudence of supply-

1 related costs and/or justify requests for approval of electricity supply resources.”

2 NorthWestern’s position change between discovery and hearing did not comply with the
3 A.R.M.

4 NorthWestern does not challenge the Commission’s findings of its change in position
5 by stating at the hearing litigation would be fruitless. [See Dkt. 25.] Nonetheless, Barnes
6 testified his answer dated November 7, 2014 to a data request stated “[n]o determination has
7 been made...whether NorthWestern can pursue any actions to recover all or part of the costs
8 incurred by the outage.” [Ex. 144 at 209:9-210:8.] Barnes also testified NorthWestern provided
9 an updated response indicating its original response had not changed. [Ex. 144 at 210:9-211:3.]
10 Therefore, substantial evidence supports FoF Nos. 70 and 71.

11 NorthWestern subsequently cites Patrick Corcoran’s pre-filed rebuttal testimony that
12 reads “[t]he fact that NorthWestern might have a cause of action against another party to
13 recover the [replacement] power costs [due to the CU#4 outage] does not magically transform
14 those costs into something other than purchased power costs recoverable in an electricity
15 supply cost tracker.” [Dkt. 25 at 33 & f.n. 198 (quoting Ex. 144 at PRC-6.)] The Minnesota
16 Public Utilities Commission denied permission to a utility company to recover costs from
17 ratepayers reasoning in pertinent part to this case, “[t]here is no sworn testimony in the record
18 detailing, explaining, and documenting Company efforts to secure third-party recovery,” and
19 the Company “has provided no account of the sources explored, the fact-finding and analyses
20 conducted, [or] the conclusions reached.” *In Re Application by CenterPoint Energy*, 2010
21 Minn. PUC LEXIS 262, *80, 82-*85 (Minn. PUC 2010). Corcoran’s rebuttal testimony
22 similarly provides no insight into NorthWestern’s investigation into suing Talen or Siemens,
23 efforts to obtain replacement power costs from these entities, or why NorthWestern concluded
24

1 claims against those entities were not viable. [See Ex. 118 at PRC-1-11.] James Goetz, a
2 NorthWestern retained attorney expert witness did not “know whether NorthWestern conducted
3 even a cursory analysis [of recovering against Siemens” before retaining him. [Ex. 144 at
4 288:8-12, 291:7-11. See, also, Ex. 144 at 307:13-16.]

5 Additionally, “a utility should pursue available legal means to obtain redress from an
6 erring contractor.” *In Re Reg. of Electric Fuel Component of Rate Schedules of Toledo Edison*
7 *Co.*, 1987 Ohio PUC LEXIS 69 at *45 (reviewing case law). “Once a manufacturing defect is
8 discovered, [the California Public Utilities Commission] would expect the regulated utility to
9 pursue its available civil remedies aggressively in order to protect its ratepayers from
10 unnecessary costs, or to be prepared to justify the reasonableness of its decision to refrain from
11 pursuing those remedies.” *In re San Onofre Nuclear Generating Unit No. 1*, 1985 Cal. PUC
12 LEXIS 149 at *9. Finally, NorthWestern’s challenge to the Commission’s analysis of suing
13 Talen or Siemens occurs in the context of presuming prudence. [Dkt. 25 at 34.] As explained
14 *supra*, there is no presumption of prudence in Montana law.

15 **VIII. Fox instructs the Court defer to the Commission, and Montana Supreme Court**
16 **precedent instructs the Court’s review is limited and must not usurp the finder of**
fact.

17 NorthWestern cites *inter alia* *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) to
18 support its argument the Commission’s decision is not entitled to deference. [Dkt. 25 at 34, f.n.
19 200] *Fox* states a largely incomprehensible decision is unworthy of deference. 684 F.3d at 75
20 The Commission’s decision is comprehensible, that is the Court could read it and understand
21 the Commission’s decision. Therefore, *Fox* instructs the Commission’s decision is worthy of
22 deference. Furthermore, “the reviewing court may not substitute its judgment for that of the
23
24

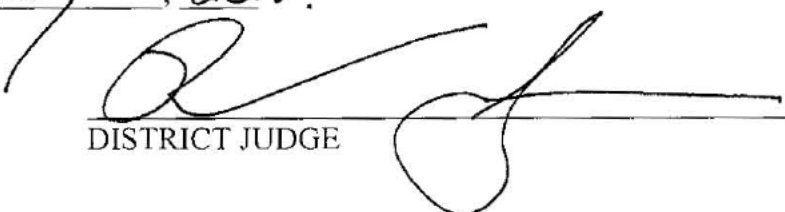
1 agency as to the weight of the evidence on questions of fact." *McDonald v. Dep't of Envtl.*
2 *Quality*, 2009 MT 209, ¶ 38, 351 Mont. 243, 214 P.3d 749.

3 **IX. The Commission did not ignore uncontradicted evidence.**

4 As recounted *supra*, substantial evidence supports the Commission's findings, the
5 Commission did not misapprehend the effect of evidence and did not commit an error of law.
6 The Court's review of the entire case leaves the Court no conviction that the Commission made
7 a mistake.

8 Therefore, **IT IS HEREBY ORDERED** that the Commission's decision to disallow
9 NorthWestern from charging its customers for the costs of replacement power due to the CU #4
10 outage is **AFFIRMED**.

11 DATED this 29th day of July, 2018.

12 
13 _____
DISTRICT JUDGE

14 cc: Sarah Norcott, Esq.

15 Special Attorneys General Justin Kraske, Esq., Jeremiah Langston, Esq.

16 Jason T. Brown, Esq.

17 Jenny K. Harbine, Esq.

18
19 CERTIFICATE OF SERVICE

20 This is to certify that the foregoing was duly served by mail/hand
21 upon the parties or their attorneys of record at their last known
addresses this 30th day of July, 2018

22 BY Janna Mory
23 Judicial Assistant to Hon. Rod Souza