ORDER ON RECONSIDERATION,
SUSPENDING DEADLINES IN THE PROCEDURAL ORDER,
AND ESTABLISHING FURTHER PROCESS

PROCEDURAL HISTORY

1. On February 23, 2018, NorthWestern Corporation dba NorthWestern Energy (“NorthWestern”) filed its Motion to Bifurcate its application for an electric utility rate increase. On March 15, 2018, the Montana Large Customer Group (“LCG”) filed its Petition to Intervene requesting general intervenor status. The Commission granted LCG’s Petition to Intervene on October 11, 2018.

2. On September 28, 2018, NorthWestern filed its Application for Authority to Increase Retail Electric Utility Service Rates and for Approval of Electric Service Schedules and Rules and Allocated Cost of Service and Rate Design (“Application”) with the Montana Public Service Commission (“Commission”).

4. On November 16, 2018, the Commission issued Procedural Order 7604a setting deadlines for various filings in the docket and a hearing date. Procedural Order 7604a also set the processes and procedure to be used in this docket. On November 26, 2018, NorthWestern filed a Motion for Reconsideration and Clarification of Procedural Order 7604a (“Motion”). NorthWestern filed a Supplement to its Motion for Reconsideration and Clarification of Procedural Order on November 30, 2018 (“Supplemental Motion”). The Commission held a regularly scheduled work session to discuss and act on NorthWestern’s Motion on December 3, 2018.

FINDINGS OF FACT

5. NorthWestern raises six distinct issues in its Motion and Supplemental Motion:
1) the deadline for filing objections to data requests; 2) the requirement for parties to provide 19 copies of data responses and testimony; 3) mass introduction of data responses; 4) availability of authors of data responses at hearing; 5) issuance of discovery by the Commission; and 6) the process of examiners ruling on motions for protective orders and limited discovery disputes. These issues are addressed in turn.

Deadline for Filing Objections to Data Requests

6. NorthWestern argues that the Commission needs to clarify when objections are due on data requests:

In paragraph 14 of the Order, the Commission requires parties to file objections to data requests within 21 days of service and before the deadline to respond to the data requests. The Commission drafted this requirement differently than the requirement in paragraph 13, which requires parties to respond to data requests by the deadline to respond. As written, objections and responses to data requests are due the same day. However, since the Commission used different language in the two paragraphs, the question arises as to whether the Commission intended for parties to file objections to data requests no later than the day before the deadline to respond to the data requests, which, if true, negates that “within 21 days” provision.

Mot., 2 (Nov. 26, 2018). NorthWestern proposes that “[t]he Commission should clarify which of the conflicting deadlines, ‘within 21 days’ or ‘before the deadline to respond’ is controlling.” Id.

7. The Commission agrees that this language needs clarification and modifies the Procedural Order to make objections due the same day as data responses. Paragraph 14 of the Procedural Order 7604b will be amended to the following: “Objections to data requests must be
filed within 21 calendar days of the service date of the data request and no later than the deadline to respond, whichever is earlier.”

_Nineteen Copies of Data Responses and Testimony_

8. NorthWestern argues that the requirement that parties provide 19 three-hole punched copies of every data response and testimony to the Commission, see Procedural Order 7604b, ¶ 5, is inconsistent with Commission rules and is “unreasonable, expensive, and burdensome,” Mot. at 3–4. Mont. Admin. R. 38.2.1209 only requires that “[t]he filing party shall provide the commission with an original plus ten conformed copies of all pleadings and documents.” NorthWestern argues “Commission may not institute a new requirement without following MAPA’s rulemaking procedures” and that while the Commission may “request additional copies,” this rule “does not require the filing of additional copies.” Mot. at 4, n.1.

9. The Commission grants NorthWestern’s Motion on this point and will strike the first sentence of ¶ 5 of Procedural Order 7604b. Instead of the language requiring 19 copies, NorthWestern and all of the parties are held to requirements of Mont. Admin. R. 38.2.1209 and any other relevant authorities in filing pleadings and documents with the Commission. NorthWestern’s assertion that the Commission may not legally request additional copies in the proceeding is incorrect. The rule states “[a]dditional copies may be requested by the staff,” suggesting this rule is flexible when circumstances warrant. Additionally, Mont. Admin. R. 38.2.305 states “[a]s good cause appears and as justice may require, the commission or any hearing examiner may waive the application of any rule, except where precluded by statute.”

10. However, despite the Commission’s legal authority to require more copies, granting NorthWestern’s Motion coheres to principles of fairness, equity, and efficiency on this issue. The Commission did not identify these avenues when requiring additional copies in Procedural Order 7604a and thus reverts to the standard approach.

_Introduction of Data Responses into the Evidentiary Record_

11. NorthWestern argues that the process outlined for admitting data requests is inconsistent with the resolution agreed to in the 1990 due process docket, 90.7.44. Mot. at 5. NorthWestern acknowledges that procedure recommends the following steps:

\[E\]ach rate case participant, including staff, will specifically identify, in a prehearing memorandum or similar notice: (a) each data response that it intends to offer as evidence; (b) the witness through which it will be offered; and (c) the
issue to which the response relates. At the beginning of the hearing all participants will be required to state whether it is their intention to permit any identified data responses to be entered into the record, without required formalities or objection, or whether they intend to require that any identified data response be offered only through a witness, subject to further objection and cross-examination.


12. This is substantially similar to what the Commission proposed in Procedural Order 7604b. The only discernable difference is that Procedural Order 7604b requires objections to be provided in “a prehearing objection memorandum”, ¶ 25, whereas the _Due Process NCA_ states the objections are to be provided “[a]t the beginning of the hearing,” p. 2–3. The Commission views having these objections provided prior to the hearing preferable to taking up this task the day of the hearing. The approach in Procedural Order 7604b promotes efficiency—the essential purpose of this process—by having fewer issues to address on the day of the hearing. The approach in Procedural Order 7604b also provides the parties and Commission more notice of what data responses are objected to so that these entities may come to the hearing prepared to establish foundation and relevance for these data responses.

13. NorthWestern’s requests for modifying the process of introducing data requests are less consistent with _Due Process NCA_ than Procedural Order 7604b as currently written. NorthWestern proposes modifying this Order to state “[b]y May 13, 2019, parties must also identify any responses they have collectively agreed to introduce into the evidentiary hearing record without first establishing foundation for each individual data request.” Mot. at Attach. A, ¶ 20. The _Due Process NCA_ does not contemplate agreement among the parties; it allows any party to object to the introduction of a data request at hearing. Procedural Order 7604b largely accomplishes the same objective by allowing parties to object to data requests in a filing prior to the hearing.

14. Furthermore, NorthWestern argues that Procedural Order 7604b “reduces the time the parties have for agreeing to the mass introduction of data responses” by not following the procedure provided in the _Due Process NCA_. This is not necessarily true. The _Due Process NCA_ does not provide a specific number of days that prehearing memoranda are due prior to a hearing. The Commission could set the deadline for prehearing memoranda at any time before the hearing and thus it is entirely possible that parties could even have less time under strict
adherence to the *Due Process NCA* than the current deadlines provided in Procedural Order 7604b.

15. The Commission acknowledges that the time period between receiving prehearing memoranda and providing objections to identified data responses is relatively short given the volume of discovery that will likely result from this proceeding. However, the schedule adopted by the Commission reflects a balancing of NorthWestern’s and intervening parties’ competing interests. Commission staff initially drafted a schedule that accommodated a number of scheduling conflicts affecting NorthWestern. A number of requests for modifications to that initial schedule from the intervening parties were not adopted, in part, because NorthWestern vigorously opposed the changes. However, the Commission staff did find reasonable the intervening parties’ recommendation that the hearing should start on Monday, May 13, 2019, rather than Wednesday, May 15, 2019, as initially drafted by Commission staff. After some contemplation, Commission staff determined starting the hearing on Monday is preferable because the hearing will likely take multiple days. In consideration of NorthWestern’s objection to shortening the periods to respond to discovery on rebuttal testimony, Commission staff shortened the periods between data responses on rebuttal testimony, prehearing memoranda, and objections to data requests identified in the prehearing memoranda. See Procedural Order 7604b, ¶ 4(j)–(l). The other modifications are consistent with NorthWestern’s request to not have discovery due during the holidays and to make Procedural Order 7604b more internally consistent to achieving those ends. Ultimately, the schedule in Procedural Order 7604b favors NorthWestern more than the intervening parties because the Commission adopted very few of the intervenors’ proposals while at the same time accommodating a great number of NorthWestern’s scheduling requests.

16. Because NorthWestern’s proposal is less consistent with the *Due Process NCA* than Procedural Order 7604b and tight deadlines at the end of the schedule reflect a number of compromises that, on balance, largely benefit NorthWestern, the Commission declines to modify Procedural Order 7604b on this issue. NorthWestern’s scheduling concern may, however, become a moot point depending on resolution of the fifth issue regarding Commission issued discovery. *Infra* ¶¶ 21–37.
Availability of Witnesses

17. NorthWestern argues that ¶ 30 of Procedural Order 7604b, requiring parties to “make each person that authored a data response available for cross-examination at the hearing unless the Commission approves an agreement among the parties to waive cross-examination,” is unduly burdensome and costly. Mot. at 6–7. NorthWestern also insinuates that this is contrary to the Commission’s past practices. Id. at 7 (“the Commission should follow its procedure that requires parties to identify witnesses in prehearing memoranda.”).

18. The Commission denies NorthWestern’s Motion on this issue, but provides some clarification on how authors of data requests may be made available. The Commission rejects the notion that the Commission has a procedure that is different than ¶ 30 of Procedural Order 7604b. The Commission has required this going back at least to 1996. In re Mountain Water Co., Docket 96.6.97, Procedural Order 5923 ¶ 22 (Jun. 24, 1996); In re U.S. West Communications Inc., Docket 96.8.131, Procedural Order 5937a ¶ 22 (Aug. 29, 1996). Furthermore, this process has been used in large and voluminous cases regarding Northwestern. In re NorthWestern’s Hydro Acquisition, Docket D2013.12.85, Procedural Order 7323b ¶ 20 (Jan. 16, 2014).

19. The purpose of this rule has become apparent in past proceedings. Witnesses have a habit of deferring or avoiding questions, especially the difficult ones, to other witnesses. See, e.g., In re NorthWestern’s PCCAM Proposal, Docket D2017.5.39, Hr’g Tr. 53:5–57:3, 419:9–15 (Jun. 1, 2018). Requiring witnesses to be available during the hearing has the potential to limit a cascading effect in which important witnesses—due to many questions being deferred to them—are unavailable to testify. Furthermore, it is exceedingly difficult to predict which witnesses will be able to answer important questions prior to the hearing and the further development of identified issues through cross examination.

20. The Commission clarifies that requiring the authors of data responses to be available is a flexible concept and lies in the informed discretion of the presiding officer. An individual that has authored a data response is not expected to sit in the hearing room for every moment a hearing is occurring. In the past, the Commission has made reasonable accommodations for witnesses. For example, it has allowed NorthWestern witnesses to appear by phone. See, e.g., In re New Colony Wind, LLC, Docket 2017.6.45, Hr’g Tr. 8:12–20 (Nov. 31, 2017). The Commission will continue to allow such accommodations so long as the requests are reasonable.
Discovery Issued by the Commission

21. NorthWestern argues that the Commission does not have the authority to issue discovery on the parties and move responses into the evidentiary record. Mot. at 7–9. NorthWestern argues:

The Commission must conduct this proceeding as a contested case proceeding under MAPA and allow the parties to present evidence. The Commission’s role is to evaluate the evidence. The constitutional requirements for a fair hearing do not allow the Commission to both introduce the evidence as a party and evaluate the evidence as the judge.

*Id.* at 7 (citations omitted). NorthWestern cites to case law from Pennsylvania for the proposition that an agency may not combine both adjudicative and prosecutorial functions. *Id.* at 8 (citing *Appeal of Kriss*, 57 Pa. Cmwlth. 326, 331, 426 A.2d 1216 (1981); *Bruteyn Appeal*, 32 Pa. Cmwlth. 541, 380 A.2d 497 (1977)). NorthWestern also provides the Montana’s Human Rights Bureau as an appropriate process for separating investigatory and adjudicatory roles.


23. Notwithstanding this skepticism, the Commission’s issuance of discovery is a longstanding practice. The Commission implemented its discovery rule in 1977, 12 Mont. Admin. Reg. 1213-1215 (Dec. 23, 1977). In this same rulemaking, the Commission clarified that “commission staff shall have the full rights and responsibilities of parties under these rules, but shall not be bound by the rule governing contact between parties and the commission.” *Id.* at 1203-1204. This was not without controversy. The administrative register provides this response and reason for to adopting this rule:

The definition of “party” in-subchapter 6 affords the Commission staff the rights and responsibilities of a “party,” while exempting them from the prohibition of ex parte communications with the Commission. Mountain Bell’s comments suggest that this raises due process problems. Existing case law, however, suggests that such treatment is permissible and not violative of due process standards. Further, the limited number of Commission staff prevents the “separation of functions” enjoyed by many federal agencies.
24. Again in 1988, Montana-Dakota Utilities (“MDU”) raised a substantially similar argument that the Commission staff could not simultaneously ask discovery, seek admission of data responses into the evidentiary record, and provide advice in adjudicating a rate case. *In re Mont.-Dakota Utils. Co.*, Docket 88.11.53, Order 5399b ¶¶ 8–26 (Dec. 8, 1989). The Commission rejected MDU’s argument citing statutes that allow the Commission to request information and present it at hearing. *Id.*, ¶ 8 (citing Mont. Code Ann. § 69-2-102). The Commission’s order also cited to the same administrative rule that permits parties to engage in discovery and describes Commission staff as having the “full rights and responsibilities under these rules . . . .” *Id.*, ¶ 9.

25. The Commission continued asking discovery of parties into 1990 when the Commission open its so-called due process docket. There, the parties presented a number of concerns with Commission staff propounding discovery on the parties. Memo. of Robin McHugh, 5–6 (Mar. 13, 1991). Parties also took issue with the Commission staff supposedly occupying both advisory and advocacy roles. *Id.* at 4–7. One party argued that “when staff does participate in the discovery process, it should do so within the time frames established in the procedural order.” Comments of Great Falls Gas Co., p. 4 (Sept. 10, 1990). The crux of utilities’ argument at that time was that Commission should act *more like a party* by adhering to deadlines rather than exercising its broad statutory information gathering authority.

26. Despite the parties raising concerns with the Commission’s discovery process, the Commission declined to eliminate the practice of Commission staff issuing discovery. The Commission also did not separate its staff into advisory and advocacy staff. Instead, the Commission implemented an additional issue process, a requirement for prefiling notification of rate case filings, and a process to admit data responses in lieu of their mass introduction. *Due Process NCA* at p. 1–3. If the *Due Process NCA* is indeed a complete and fair resolution of the due process concerns raised by regulated parties almost 30 years ago, as NorthWestern suggests, see *Mot.* at 5, then the continued practice of Commission staff should also be considered a complete and fair resolution of those issues. In other words, it would seemingly be inconsistent to tout one outcome of this docket (*i.e.*, initiating a new process to supplant the mass introduction of data requests) while at the same time criticizing other outcomes (*i.e.*, continued staff issuance
of discovery). The Commission has done its best to follow all of the processes described in the *Due Process NCA. Supra ¶¶ 11–14.*

27. Now, for the first time in recent years, a regulated party has sought reconsideration of a procedural order whose procedures are founded on the *Due Process NCA.* The gravity of the case before the Commission is considerable. NorthWestern requests an increase in base electric rates of $34,861,573. App., 1 (Sept. 28, 2018). This is NorthWestern’s first electric rate case in over a decade. *In re NorthWestern Energy’s PCCAM Proposal,* Docket D2017.5.39, NCA II ¶ 10 (Jul. 7, 2017). The Commission views its inquiries into updating NorthWestern’s electricity supply base rates as a reason for why this case is before the Commission today. *Id.* ¶¶ 10–21. In order to appropriately consider the issue that NorthWestern has raised, the deadlines in Procedural Order 7604b are held in abeyance, with two exceptions. The on-site audit is scheduled for next week and NorthWestern has not objected to staff’s attendance at that meeting; this portion of the schedule remains in place. Procedural Order 7604b ¶ 4(a). Additionally, NorthWestern has not questioned the ability for parties to ask discovery; therefore the parties may continue to ask discovery under the rolling discovery rule. *Id.* ¶ 13. However, the Commission will refrain from asking data requests while this matter is considered. All of the remaining deadlines are dependent upon the Commission’s ability to issue data requests. Most acutely, the discovery and intervenor testimony will inform the Commission’s consideration of identifying additional issues. *Id.* ¶ 4(e); *Due Process NCA* at pp. 1–2. The nine-month period allowing NorthWestern to self-implement rates does not toll while the proceeding is held in abeyance. Mont. Code Ann. § 69-3-302(2).

28. As the Commission stated in 1990, “the Commission believes that, as the head of an agency of State government, it has an obligation, when confronted with persistent objections and complaints, to openly and seriously review its decision making process and to decide whether any change is necessary.” *In re Mont. Pub. Serv. Comm’n Decision Making Process,* Docket 90.7.44, Not. of Inquiry, p. 2 (Aug. 7, 1990). The Commission accordingly requests guidance from the parties through supplemental briefing on its authority to collect information from regulated entities and parties appearing before it in this particular rate case and appropriate procedures for doing so.

29. The Commission notes that its information collecting authority is well-established. *See Mont. Code Ann.* §§ 69-2-102, 69-3-106(2). NorthWestern has argued that the
Montana Administrative Procedure Act ("MAPA") precludes the Commission issuing data requests. Mot. at 7 (citing Mont. Code Ann. § 2-4-612). Mont. Code Ann. § 2-4-612 states "[e]xcept as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence." (Emphasis added.) The information collecting statutes identified above are unique to the Commission. Accordingly, it may not be appropriate to make blanket statements about MAPA’s requirements without close examination of Title 69. Furthermore, *generalia specialibus non derogant* is a contextual canon that suggests that "if there is a conflict in a legal instrument between a general provision and specific provision, the specific provision prevails." *General/specific canon*, Black’s Law Dictionary (10th ed. 2014). The Commission notes while the practices of other jurisdictions may provide helpful examples, they do not necessarily dictate what is legally required in Montana. *NorthWestern Corp. v. Mont. Pub. Serv. Comm’n*, Cause No. DV16-1236, Order Affirming the Mont. Pub. Serv. Comm’n, p. 9 (Mont. 13th Jud. Ct. Jul. 29, 2018); *Cascade County Consumers Ass’n v. Mont. Public Serv. Comm’n*, 144 Mont. 169, 191–92, 394 P.2d 856 (1964).

30. The Commission further notes that Mont. Code Ann. §§ 69-3-106(2) specifically authorizes commissioners, among others, to require the production of utility information. Individual commissioners are by definition the adjudicators who resolve contested cases before the Commission. Mont. Code Ann. §§ 69-1-101 to -103, 2-15-102(10). Thus, the regulatory scheme created by the Montana legislature for the regulation of public utilities appears to place individuals in the position both of making determinations and conducting investigations.

NorthWestern’s argument regarding combining investigatory and adjudicatory roles is seemingly categorical; as in it can never occur. Mot. at 7–8. NorthWestern has not explained how its position is consistent with Montana’s scheme to regulate public utilities pursuant to Title 69. NorthWestern appears to argue that, even though the Commission may obtain information from a utility, it may not do so within a contested case conducted pursuant to MAPA. *Id.* Yet none of the statutes which govern the Commission’s ability to obtain information from a public utility exclude such proceedings, or confine the Commission’s exercise of these powers only to particular proceedings. Indeed, Mont. Code Ann. § 69-2-102 provides that “the Commission or its staff” may ask questions “in any hearing,” and that the Commission may introduce evidence to ensure the adequacy of the record so long as counsel of record are first requested to do so. Mont. Code Ann. § 69-3-106 similarly contains no exclusion for contested cases pursuant to
MAPA. Mont. Code Ann. § 69-3-106(1) establishes the section’s purpose as concerning “right to obtain all necessary information to enable the commission to perform its duties.” These duties presumably include the seminal duty of establishing rates and practices, which is what the instant proceedings concern. Meanwhile, Mont. Code Ann. § 69-3-106(2) provides that “the Commission, any commissioners, or any person or persons employed for that purpose” may inspect essentially any document belonging to a public utility and “may examine, under oath, any officer, agent, or employee of the public utility in relation to its business and affairs.” MAPA, when enacted, did not modify these statutes, nor did it include language superseding conflicting statutes; indeed, it contained the opposite provision, suggesting that MAPA was intended to accommodate statutes such as these. Supra ¶ 29.

31. The Commission points out that “[c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” Cafeteria & Restaurant Workers Union v. MclElroy, 367 U.S. 886, 895 (1961). “[T]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.” Goldstein v. Commission on Practice, 2000 MT 8 ¶ 31, 297 Mont. 493, 995 P.2d 923, citing Withrow v. Larkin, 421 U.S. 35 (1975). NorthWestern’s business is affected by the public interest and it may have divergent due process rights from private litigants. See, e.g., Great N. Utils. Co. v. Pub. Serv. Comm’n, 88 Mont. 180, 231, 293 P. 294, 308 (1930) (“A public utility, operating under a franchise, has no constitutional right of competition. . . . . The business of a public utility, under statutory regulation, becomes, by force of the statute, a legal monopoly.’”). As a result, the due process rights afforded to litigants before other agencies might diverge from that afforded to a utility, which is a monopoly operating under a government issued franchise right and cloaked in the public interest. Contra Mot at 8.

32. With these authorities and perspectives in mind, the Commission asks the parties to address four different possibilities for addressing NorthWestern’s concerns. First, the Commission could maintain its current practice, although the Commission notes that in treating itself like a party, and by terming the questions it issues “discovery” and subjecting itself to the same procedural deadlines as the parties, it may confuse the issue since the Commission has discrete statutory authority to ask a public utility questions, which is indeed less constrained than what parties to a contested case are entitled to.
33. Second, in order to clarify the situation, the Commission could modify the section of the procedural order pertaining to discovery and instead adopt categories of inquiries that distinguish the Commission from parties and reflect the Commission’s explicit statutory authority to collect information from public utilities and other parties. For instance, the Commission could include in a new procedural order issue the following provisions.

**Inquiry pursuant to Mont. Code Ann. §§ 69-3-106(2)**
Such an inquiry may be made of NorthWestern at any time during the proceeding by the commission, any commissioner, or any member of the Commission’s staff who is assigned to the docket by their superior. NorthWestern must respond to this inquiry within 14 days. When the inquiry can be answered by reference to books, accounts, papers, records or memoranda of NorthWestern, the company shall provide the same. When an inquiry does not pertain exclusively to written documents as contemplated in Mont. Code Ann. § 69-3-106(2), then it must be answered in narrative form by one or more officers, agents, and/or employees of NorthWestern, who must be identified and must swear, by affidavit, to the truth of their narrative. See id. (allowing “[t]he commission, any commissioner, or any person or persons employed by the commission for that purpose, upon demand . . . to examine, under oath, any officer, agent, or employee of the public utility in relation to its business and affairs.”). When an inquiry is most comprehensively answered both by submitting copies of written materials and by narrative, NorthWestern must submit both.

**Notice pursuant to Mont. Code Ann. § 69-2-102**
The Commission may submit, at any time after the deadline for pre-filed testimony by a party, that the party or parties address any issue which the Commission believes has not been adequately addressed. The Commission may use such a notice to identify responses to parties’ discovery or inquiries made pursuant to Mont. Code Ann. § 69-3-106(2) which, if introduced as evidence, would adequately address such an issue. However, the Commission may also employ such a notice to require parties to submit, in writing or through live testimony, new information which they then may be moved into evidence at the hearing. Should a party not move such information as the Commission has requested into the evidentiary record, the Commission may do so *sua sponte*.

Additionally, this process could allow any commissioner to ask questions at the hearing of any witness and the answers to such questions will be evidence in the proceeding under Mont. Code Ann. § 69-2-102. The Commission staff, through a staff attorney, could be able to exercise this same function.

34. Third, the Commission could implement separate advisory and adjudicatory staff. In the 1990 docket, the Commission expressly stated it would “not deviate from an advisory staff model in the context of a typical rate case.” *In re Mont. Pub. Serv. Comm’n Decision Making*
Process, Docket 90.7.44, Not. of Inquiry at p. 2. Commission legal staff described the model of adjudications used by the Montana Commission:

1) The staff is not a party; 2) The staff investigates toward the end of advising the Commission on just and reasonable rates; 3) The staff does not investigate on behalf of any constituency interest, either utility or consumer, it investigates on behalf of the public interest; and 4) The staff, through cross-examination and introduction of evidence seeks to ensure that the record will support a range of reasoned decisions.

Memo. of Robin McHugh, 3 (Mar. 13, 1991). However, if the Commission were to desire to have its staff present testimonial evidence to further the public interest, this approach would accommodate this. Yet this third approach would be contrary to the regulatory form that has been in place at least since the 1970s. There is nothing in Title 69 that contemplates that staff, if its function is only to obtain information and submit that information as evidence, must be separated from the agency’s decision-makers; indeed, as described above, the opposite is true. Supra ¶¶ 29–30. Furthermore, there is not the financial support from the Montana Legislature to make this an especially feasible approach at this juncture. Nevertheless, the Commission considers this approach because it was proposed by NorthWestern. See Mot. at 8.

35. Fourth, the Commission could open a concurrent investigative docket into NorthWestern’s rates. Mont. Code Ann. § 69-3-324. The Commission could collect information in that docket until prior to the hearing. Id. § 69-3-106(2). The Commission could then consider whether this information is necessary to complete an adequate or sufficient record in Docket D2018.2.12, and could direct parties’ counsel to address it at hearing. Id. § 69-2-102. This would separate the investigatory practice of the Commission.

36. Fifth, the Commission could simply abrogate its traditional practice of asking written questions of the public utility or other parties. This would be an exceptional departure, but the Commission considers it as a bookend alternative.

37. The Commission directs parties to provide their perspectives on the Commission’s analysis of its legal authority to collect information from a public utility and other parties so that this information can be used in this proceeding. The Commission also invites parties to share their views on the relative merits of the five approaches, and which the Commission should adopt. Party briefs on this matter are due December 18, 2018. The Commission will endeavor to reach a determination on a new procedural order by the beginning of 2019.
Examiners to Resolve Discovery Disputes

38. Northwestern requests clarification of the Commission’s process for having “examiners for the limited purpose of managing discovery disputes (including objections to data requests and motions to compel) and motions for protective order in this proceeding.” Procedural Order 7604b, ¶ 21. Northwestern points out all three staff attorneys are appointed as hearings examiners. Mot. at 8. Northwestern requests clarification whether “the Commission will also hear motions for reconsideration of an examiner’s final written decision.” Suppl. Mot. 2 (Nov. 30, 2018).

39. The Commission grants reconsideration on these two points. Justin Kraske will be removed as examiner for the limited purpose of managing discovery disputes and motions for protective order. The Commission will add the following language to ¶ 21 of Procedural Order 7604b:

Any party may apply for reconsideration in respect to any matter determined in a Commission order of decision, including the examiner’s final written decision. The Commission will hear motions for reconsideration of an examiner’s decision, and may grant oral argument on that motion upon request.

See Suppl. Mot. at 2.

CONCLUSIONS OF LAW

40. All findings of fact that are properly conclusions of law are incorporated herein and adopted as such.

41. “The commission is . . . invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of this chapter . . . .” Mont. Code Ann. § 69-3-102.

42. “In addition to the modes of procedure hereinafter prescribed in particular cases and classes of cases, said commission shall have power to prescribe rules of procedure and to do all things necessary and convenient in the exercise of the powers conferred by this chapter upon the commission . . . .” Id. § 69-3-103.

43. “The commission shall have the power to: (a) adopt reasonable and proper rules relative to all inspections, tests, audits, and investigations; (b) adopt and publish reasonable and proper rules to govern its proceedings; and (c) regulate the mode and manner of all investigations and hearings of public utilities and other parties before it.” Id.
“The commission, any commissioner, or any person or persons employed by the commission for that purpose, upon demand, has the right to inspect the books, accounts, papers, records, and memoranda of any public utility and to examine, under oath, any officer, agent, or employee of the public utility in relation to its business and affairs. Any person, other than one of the commissioners, who makes the demand shall produce the person’s authority to make the inspection.” *Id.* § 69-3-106(2).

“In any case involving an application by a regulated entity to the commission for authority to increase its rates that is actively contested by the consumer counsel, the commission shall leave representation of the interests of consumers to the consumer counsel when the consumer counsel timely petitions to become a party to the case. *This section does not prohibit* the commission or its staff from *investigating* and interrogating in *any hearing* to clarify the case or present an issue. Evidence may be introduced by the commission on an issue that has not been adequately addressed by any party if the commission first requests counsel of record to address the issue and counsel fails to introduce sufficient or adequate evidence.” *Id.* § 69-2-102 (emphasis added).

At a hearing in a contested case proceeding, “[o]ppportunity shall be afforded all parties to respond and present evidence and argument on all issues involved. *Except as otherwise provided by statute relating directly to an agency*, agencies shall be bound by common law and statutory rules of evidence.” *Id.* § 2-4-612 (emphasis added).

“The proceedings before the commission are investigative on the part of the commission, although they may be conducted in the form of adversary proceedings.” Mont. Admin. R. 38.2.302.

“‘Contested case’ means a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing.” Mont. Code Ann. § 2-4-102(4).

“‘Quasi-judicial function’ means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes but is not limited to the functions of: (a) interpreting, applying, and enforcing existing rules and laws; (b) granting or denying privileges, rights, or benefits; (c) issuing, suspending, or revoking licenses, permits, and certificates; (d) determining rights and interests of
adverse parties; (e) evaluating and passing on facts; (f) awarding compensation; (g) fixing prices; (h) ordering action or abatement of action; (i) adopting procedural rules; (j) holding hearings; and (k) any other act necessary to the performance of a quasi-judicial function.” Id. § 2-15-102(10) (emphasis added).


51. Due process is flexible and calls for such procedural protections as the particular situation demands. Indeed, the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. Rather, asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. State v. West, 2008 MT 338, ¶ 32, 346 Mont. 244, 194 P.3d 683.

ORDER

52. Paragraph 14 of the Procedural Order 7604b will be amended to the following: “Objections to data requests must be filed within 21 calendar days of the service date of the data request and no later than the deadline to respond, whichever is earlier.”

53. The Commission will strike the first sentence of ¶ 5 of Procedural Order 7604b. Instead of the language requiring 19 copies, NorthWestern and all of the parties are held to requirements of Mont. Admin. R. 38.2.1209 and any other relevant authorities in filing pleadings and documents with the Commission.

54. The Commission clarifies that requiring the authors of data responses to be available is a flexible concept and lies in the informed discretion of the presiding officer. An individual that has authored a data response is not expected to sit in the hearing room for every moment a hearing is occurring. In the past, the Commission has made reasonable accommodations for witnesses. The Commission will continue to allow such accommodations so long as the requests are reasonable.

55. Parties are requested to brief the issue of the Commission’s information collecting methods. Supra ¶¶ 21–37. Party briefs on this matter are due December 18, 2018.

56. Deadlines in Procedural Order 7604b are held in abeyance, with two exceptions.
a. The on-site audit remains in place. Procedural Order 7604b ¶ 4(a).

b. The parties may continue to ask discovery under the rolling discovery rule. *Id.*, ¶ 13.

c. The Commission will refrain from asking data requests while this matter is considered.

d. The nine-month period allowing NorthWestern to self-implement rates does not toll while the proceeding is held in abeyance.

57. Justin Kraske will be removed as examiner for the limited purpose of managing discovery disputes and motions for protective order.

58. The Commission will add the following language to ¶ 21 of Procedural Order 7604b: “Any party may apply for reconsideration in respect to any matter determined in a Commission order of decision, including the examiner’s final written decision. The Commission will hear motions for reconsideration of an examiner’s decision, and may grant oral argument on that motion upon request.”

59. The remainder of NorthWestern’s Motion is DENIED.

DONE AND DATED this 3rd day of December, 2018, by a vote of 5 to 0.
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BRAD JOHNSON, Chairman

TRAVIS KAVULLA, Vice Chairman

ROGER KOOPMAN, Commissioner

BOB LAKE, Commissioner

TONY O’DONNELL, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

Seal
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Order on Reconsideration, Suspending Deadlines in the Procedural Order, and Establishing Further Process issued on December 6, 2018 in Docket D2018.2.12 was served upon the following,

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