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## JONES DAY

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December 17, 2019

Via E-Mail (shareholderproposals@sec.gov)

U.S. Securities and Exchange Commission  
Division of Corporation Finance  
Office of Chief Counsel  
100 F Street, N.E.  
Washington, D.C., 20549

Ladies and Gentlemen:

On behalf of our client, NorthWestern Corporation, a Delaware corporation (the "Company"), we are submitting this letter pursuant to Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), in reference to the Company's intention to omit the shareholder proposal (the "Proposal") submitted by Thomas Tosdal (the "Proponent") from the Company's 2020 proxy statement and form of proxy (the "2020 Proxy Materials") relating to its 2020 Annual Meeting of Shareholders (the "2020 Annual Meeting"), tentatively scheduled for April 23, 2020. The Company intends to file, pursuant to Rule 14a-6, the 2020 Proxy Materials for the 2020 Annual Meeting on or about March 6, 2020. The Company hereby respectfully requests confirmation that the staff of the Division of Corporation Finance (the "Staff") will not recommend that enforcement action be taken by the Securities and Exchange Commission (the "Commission") if, in reliance on the analysis set forth below, the Company excludes the Proposal from its 2020 Proxy Materials.

Pursuant to Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D"), the Company is submitting this request for no-action relief under Rule 14a-8 of the Exchange Act by use of the Commission email address, shareholderproposals@sec.gov (in lieu of providing six additional copies of this letter pursuant to Rule 14a-8(j)(2)), and the undersigned has included his name, email address and telephone number in this letter. We are simultaneously forwarding by certified mail a copy of this letter to the Proponent as notice of the Company's intent to exclude the Proposal from the 2020 Proxy Materials. Also pursuant to Rule 14a-8(j), this letter is being filed no later than 80 calendar days before the Company intends to file its 2020 Proxy Materials.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder proponents elect to submit to the Commission or the Staff. Accordingly, the Company is taking this opportunity to remind the Proponent that if he submits correspondence to the Commission or the Staff with

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respect to the Proposal, a copy of that correspondence should concurrently be furnished to the undersigned on behalf of the Company.

The Company respectfully requests that the Staff concur in its view that the Proposal may be excluded from the 2020 Proxy Materials pursuant to Rule 14a-8(i)(7) and/or Rule 14a-8(i)(3) of the Exchange Act for the reasons set forth below.

### **THE PROPOSAL**

On September 24, 2019, the Company received the Proposal from the Proponent. The Proposal sets forth the following resolution to be voted on by the Company's shareholders at the 2020 Annual Meeting:

WHEREAS the evidence of human-caused climate change is overwhelming, the impacts of climate change are intensifying across the country, and unless prompt action is taken climate change will cause increasing harm to Montana's agriculture, tourism, and infrastructure by severe wildfires, drought, flooding, and decreased flows for hydroelectric generation;

WHEREAS carbon dioxide emissions are the largest contributor to climate change, and coal mining and coal fired plants emit carbon dioxide and other greenhouse gases;

WHEREAS 39% of Northwestern Energy Company's (NWE) Montana electricity generation comes from plants that emit carbon dioxide and other greenhouse gases from coal and natural gas combustion;

WHEREAS NWE projects its carbon emission rates through 2038 to be very close to those in 2020, about 800 pounds of carbon dioxide per megawatt hour, most of which will come from the Colstrip Unit 4 coal fired plant located in Montana;

WHEREAS the plant's age, departure of other owners, remediation costs, uncertain regulatory environment, and the dim future of the coal industry make NWE's 30% investment in Unit 4 and reliance on coal fired electricity an increasingly risky investment, posing a danger Colstrip may become a stranded asset;

WHEREAS Talen Energy, Colstrip's operator, will permanently shut down Units 1 and 2 in 2019 because they are uneconomical and, apart from Talen's 30% interest in Unit 3, the other partial owners of Colstrip Units 3 and 4 (Puget Sound Energy, Inc.,



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Portland General Electric Co., Avista Corporation and PacifiCorp) are required by their home state laws to eliminate coal fired electricity by 2025 and 2030 respectively;

WHEREAS the present remediation cost for groundwater contamination by Colstrip coal ash approaches \$700 million, of which NWE must pay its part, and NWE's future remediation costs will increase out of present proportion as other owners of Colstrip depart;

WHEREAS Units 3 and 4, now 35 years old, continue to emit unlawful levels of hazardous air pollutants, requiring temporary shutdown in 2018, and an enforcement action by Montana DEQ is pending;

WHEREAS the Montana Legislature rejected NWE's effort to expand ownership of Colstrip and pass increased decommissioning and remediation costs to consumers, and the future federal regulatory scheme is uncertain, with candidates extolling a "Green New Deal;"

WHEREAS the coal supply for Colstrip is uncertain given the collapse of the coal mining industry;

WHEREAS non-carbon emitting renewable energy sources such as improved hydroelectric generation, wind, and solar are less expensive and increasingly available in Montana;

THEREFORE, BE IT RESOLVED the shareholders request Northwestern Corporation plan for the Northwestern Energy Company to cease coal fired generation of electricity from the Colstrip plant and replace that electricity with non-carbon emitting renewable energy and 21<sup>st</sup> century storage technologies with its own assets or from the market no later than the end of the year 2025, and to share that plan with the shareholders no later than the 2021 annual meeting.

Documents supporting this proposal are found at [350montana.org](http://350montana.org).

A copy of the Proposal, including the supporting statement, is attached to this letter as Exhibit A. Copies of additional correspondence with the Proponent are attached to this letter as Exhibit B.

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### **BACKGROUND**

The Company, doing business as NorthWestern Energy, is a public utility company providing electricity and natural gas to approximately 762,400 customers in Montana, South Dakota and Nebraska as well as to the Yellowstone National Park. The Company strives to balance legal requirements to provide cost-effective, reliable and stably priced energy with being good stewards of natural resources, with a diligent focus on sustainability. The Company owns a mix of clean and carbon-free energy resources balanced with traditional energy sources to help the Company deliver both affordable and reliable electricity and natural gas to its customers. The Company supports cost-effective energy efficiency programs and low or carbon-free resources as part of its diverse supply portfolio. In 2018, approximately 55% of the Company's retail needs originated from carbon-free resources, and the Company's electricity generation portfolio for Montana in 2018 consisted of 61% carbon-free generation.

The Proposal relates to the Company's partial ownership in Colstrip Unit 4 ("Unit 4"), a coal-fired electricity-generating unit at the Colstrip Power Plant ("Colstrip") in Montana. The Proposal requests that the Company cease generating electricity from Unit 4 and replace that electricity generation with non-carbon emitting electricity generation by the end of 2025. The Proposal also requests the Company share its plan to meet this requirement with shareholders no later than the Company's 2021 annual meeting.

The Company acquired a 30% ownership interest in Unit 4 in 2002 when it bought the Montana Power Co. electric and natural gas transmission and distribution system. Unit 4 is part of a larger operation consisting of four coal-fired electricity-generating units at Colstrip. The Company recently announced that it entered into an agreement to acquire an additional 25% interest in Unit 4 from one of the other co-owners. Closing of the acquisition of the additional 25% interest is subject to a number of conditions, including regulatory approval.

The remaining depreciable life of the Company's investment in Unit 4 is through 2042. Recovery of costs associated with a shut-down of the Company's operations at Unit 4 prior to the end of its useful life, currently slated for 2042, would be subject to Montana Public Service Commission ("MPSC") approval.

As part of this recent announcement relating to the additional 25% interest, the Company also unveiled its carbon reduction vision statement for Montana pursuant to which the Company committed to reduce the carbon intensity of its energy generation in Montana by 90% (compared to 2010) by 2045. Over the last decade, the Company reduced the carbon intensity of its energy generation in Montana by more than 50%. In the last five years alone, it invested more than \$1



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billion in clean energy projects, including hydro, wind and solar facilities. With the announcement of the carbon reduction vision statement, the Company has committed to going even further in supplying carbon-free energy to its Montana customers.

### ANALYSIS

**I. THE PROPOSAL MAY BE PROPERLY EXCLUDED UNDER RULE 14A-8(i)(7) BECAUSE THE PROPOSAL DEALS WITH A MATTER RELATING TO THE COMPANY'S ORDINARY BUSINESS OPERATIONS, SPECIFICALLY, THE PROPOSAL MAY BE PROPERLY EXCLUDED BECAUSE IT SEEKS TO MICROMANAGE THE COMPANY BY PROBING TOO DEEPLY INTO MATTERS OF A COMPLEX NATURE UPON WHICH SHAREHOLDERS, AS A GROUP, ARE NOT IN A POSITION TO MAKE AN INFORMED JUDGMENT.**

Under Rule 14a-8(i)(7), a proposal is excludable if it “deals with a matter relating to the company’s ordinary business operations.” The Commission has explained that two central considerations determine whether a proposal is excludable under Rule 14a-8(i)(7). *See* SEC Release No. 34-40018 (May 21, 1998) (the “1998 Release”). The first relates to the subject matter of the proposal and whether the subject of the proposal concerns tasks “so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.” *Id.* The second “relates to the degree to which the proposal seeks to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.” *Id.* A proposal likely crosses the micromanagement line if it “involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” *Id.*

In the 1998 Release, the Commission stated that proposals “relating to [ordinary business] matters but focusing on sufficiently significant social policy issues . . . generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.” However, the Staff has repeatedly allowed the exclusion of proposals that focus on significant social policy issues where the proposal seeks to micromanage the company by specifying in detail the manner or method in which the company should address the significant social policy issue. *See, e.g., MGE Energy, Inc.* (Mar. 13, 2019) (“MGE Energy”)

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(concurring in the exclusion of a proposal requesting the company to publish a report describing how the company can provide a secure, low cost energy future for its customers and shareholders by eliminating coal and moving to 100% renewable energy by 2050 or sooner even though the proposal concerned greenhouse gas emission reduction); *Apple, Inc.* (Dec. 5, 2016) (“Apple 2016”) (concurring in the exclusion of a proposal requesting the company to reach net-zero greenhouse gas emissions by 2030 for all aspects of its business and those of its major suppliers despite the proposal’s aim to reduce the company’s greenhouse gas emissions); *Marriott International Inc.* (Mar. 17, 2010) (concurring in the exclusion of a proposal limiting showerhead flow to no more than 1.6 gallons per minute and requiring the installation of mechanical switches to control the level of water flow despite a recognition that global warming, which the proposal sought to address, is a significant social policy issue); *Ford Motor Company* (Mar. 2, 2004) (concurring in the exclusion of a proposal requesting the preparation and publication of a detailed report regarding the existence of global warming or cooling despite the company’s acknowledgment that global warming is a significant social policy issue).

In Staff Legal Bulletin No. 14K (Oct. 16, 2019) (“SLB 14K”), the Staff elaborated on the micromanagement prong of the ordinary business operations exception, stating that whether a proposal micromanages turns on the prescriptiveness of the proposal. *Id.* The Staff stated they look “to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board.” *Id.* If the method or strategy for implementing the action requested by the proposal is too prescriptive, and therefore puts limits on the judgment and discretion the board and management may use in implementing the proposal, then such proposal may be viewed as micromanaging. *Id.*

In SLB 14K, the Staff contrasted two similar proposals, finding one to be too prescriptive such that it could be excluded under the micromanagement prong of Rule 14a-8(i)(7) while the other was not too prescriptive and, thus, could not be excluded under the micromanagement prong. The first proposal sought annual reporting on “short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement to keep the increase in global average temperature to well below 2 degrees Celsius and to pursue efforts to limit the increase to 1.5 degrees Celsius.” There, the Staff concluded the proposal “micromanaged the company by prescribing the method for addressing reduction of greenhouse gas emissions” and “effectively require[ed] the adoption of time-bound targets (short, medium and long) that the company would measure itself against and changes in operations to meet those goals, thereby imposing a specific method for implementing a complex policy.” SLB 14K. On the other hand, the Staff found a proposal that sought a report “describing if, and how, [a company] plans to reduce its total contribution to climate change and align its



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operations and investments with the Paris [Climate] Agreement's goal of maintaining global temperatures well below 2 degrees Celsius" did not "micromanage the company to such a degree that exclusion would be appropriate" because the proposal "deferred to management's discretion to consider if and how the company plans to reduce its carbon footprint and asked the company to consider the relative benefits and drawbacks of several actions." *Id.* The Staff further clarified that when a proposal "prescribes specific actions that the company's management or the board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted." *Id.*

The Staff has permitted exclusion under Rule 14a-8(i)(7) of shareholder proposals similar to the Proposal that attempt to micromanage a company by "seek[ing] to impose specific time-frames or methods for implementing complex policies." 1998 Release. In a no-action letter granted to EOG Resources, Inc. ("EOG") on February 26, 2018 (recon. denied Mar. 12, 2018), the Commission allowed exclusion of a proposal requesting that EOG "adopt company-wide, quantitative, time-bound targets for reducing greenhouse gas (GHG) emissions" and issue a report discussing the company's plans and progress toward achieving such targets. There, EOG argued the proposal sought to micromanage the company because it would have required the company's management to "subjugate its real-time operational decisions to company-wide, rigid, time-bound quantitative targets." EOG further argued that its management would be forced to focus on the required greenhouse gas emissions targets instead of other factors that would influence management's operational decisions. The Staff concurred with EOG, stating that the proposal "seeks to micromanage the Company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."

In MGE Energy, the Commission permitted exclusion of a proposal requesting the company to "prepare a public report no later than October 1, 2020, describing how they can provide a secure, low cost energy future for their customers and shareholders by eliminating coal and moving to 100% renewable energy by 2050 or sooner." In its no-action request letter, MGE Energy argued that the proposal at issue micromanaged the company because it pertained to the fundamental management function of choosing which electric generation supply sources the company could use to supply electricity to its customers and the timeframe within which the company had to move to renewable electricity generation. MGE Energy argued the proposal was excludable under the micromanagement prong of Rule 14a-8(i)(7) because it set forth a specific emissions target (100% renewable electricity) to be achieved within a specific timeframe (by 2050 or sooner). The Staff allowed exclusion, stating in its response letter that the proposal sought to micromanage the company by "seeking to impose specific methods for implementing



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complex policies in place of the ongoing judgments of management as overseen by its board of directors.”

In Apple 2016, the Commission concurred in Apple’s exclusion of a proposal that requested the board of directors to generate a feasible plan for the company to reach net-zero greenhouse gas emissions by the year 2030 “for all aspects of the business which are owned directly” by Apple as well as for its major suppliers. Apple argued that this proposal went too far in micromanaging the company because it would require management to replace its own judgment in making sound operational decisions with the judgment of shareholders requiring the company and its suppliers to meet an arbitrary emissions target by a specified date. The Commission agreed with Apple, stating the proposal could be excluded under Rule 14a-8(i)(7) because it sought to micromanage the company. Notably, the same proponent submitted a similar proposal the following year, which requested Apple to prepare a report that evaluated the potential for the company to achieve net-zero greenhouse gas emissions in its operations and the operations of its suppliers. The Commission once again concurred with Apple’s exclusion of the proposal on micromanagement grounds, even though the 2017 proposal differed from the 2016 proposal in that, instead of requiring the implementation of a plan to achieve net-zero emissions, the 2017 proposal simply asked the company to prepare a report evaluating the potential for the company to achieve net-zero emissions.

Here, the Proposal requests that the Company discontinue generating electricity from Unit 4 and replace such electricity generation with non-carbon emitting electricity generation by the end of the year 2025. The Proposal specifies the precise electricity generating unit the company must discontinue use of (Unit 4), the precise type of electricity generation with which the Company must replace Unit 4’s electricity generation (non-carbon emitting renewable energy) and the precise time frame in which the company must do so (no later than the end of the year 2025). In doing this, the Proposal seeks to impose a specific time frame and a specific method for addressing a complex policy and limits the judgment and discretion of management, which is precisely what the 1998 Release disallowed, as confirmed in SLB 14K. Similar to the proposal addressed in MGE Energy, the Proposal relates to the fundamental management function of determining which electricity generation supply resources the company may use to supply electricity to its customers and the timeline on which the Company must begin utilizing those resources.

Company management, and the Company’s board of directors, must take into account a vast range of complex factors when deciding what supply resources to utilize in generating electricity in order to provide electricity to its customers that is affordable, reliable, and sustainable as required by the MPSC, including:



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- The Company's commitment to the sustainability and long-term quality of the environment;
- Operational considerations;
- Cost and reliability of supply resources;
- Cost, availability and feasibility of future or replacement supply resources and the ability of the Company to connect such resources into the Company's transmission and distribution systems;
- New and emerging technologies;
- Impacts to customers including rates, reliability, and transmission and distribution availability and system constraints;
- Availability of back-up supply resources;
- Technical issues and limitations, including start-up time, capacity, and minimum and maximum generation limits;
- Ability to adjust generation output to match electricity demand as it changes throughout the day;
- Laws, regulations and policies applicable to the Company;
- The needs and desires of the communities in which the Company operates;
- Resource and capital expenditure planning considerations, including projected electricity demand, electrical generation unit development and construction planning timelines and costs; and
- Shareholder impact and value.

These complex factors, and certain other factors, were considered by Company management and the Company's board of directors when, as mentioned above, the Company recently agreed to purchase an additional 25% interest in Unit 4 and when the Company committed to its carbon reduction vision statement for Montana.

The Proposal would require management to subjugate its judgment on operational decisions regarding supply resources for electricity generation (including its recent decision to increase its ownership interest in Unit 4) to the judgment of shareholders instead, in a time-bound manner, similar to the proposal in EOG. Management would be required to arbitrarily shut down its operations at Unit 4 without taking into account the multitude of other factors that would, and should, otherwise influence management's decisions of where, how and when to supply fuel to the Company's electricity generating units. It is important to note that the

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Company also owns interests in other coal-fired generating units, but the Proposal does not seek to shut down all of the Company's coal-fired generating units – only Unit 4. As prohibited by the 1998 Release and SLB 14K, the Proposal would afford the Company zero flexibility in deciding timing and the best supply resources to use in order to continue to provide electricity to the Company's Montana customers in a safe, reliable and cost-effective manner.

Further, the decision of whether to discontinue operations at Unit 4 prior to the end of Unit 4's useful life is even more complex than other business decisions management makes because the prudence of the Company's supply procurement activities, including whether the Company continues to generate electricity from coal at Unit 4 or replaces such electricity generation with non-carbon emitting renewable energy as required by the Proposal, is subject to the MPSC's review and approval.

The Company's profitability is dependent on its ability to recover the costs of providing energy and utility services to its customers and earn a return on its capital investment in its utility operations. The Company provides service at rates established by several regulatory commissions including the MPSC and the Federal Energy Regulatory Commission. The Company's Montana operations are subject to the jurisdiction of the MPSC with respect to rates, terms and conditions of service, accounting records, electric service territorial issues and other aspects of the Company's operations. The rates the Company may charge are generally set based on an analysis of the Company's costs incurred in a historical test year. In addition, each regulatory commission to which the Company is subject sets rates based in part upon their acceptance of an allocated share of total utility costs.

Early closure of the Company's generation facilities could result in regulatory impairments or increased cost of operations. The Company is obligated to pay for the costs of closure of its share of generation facilities, including its share of the costs of reclamation of the mines that supply coal to the coal-fired power plants. Likewise, other owners or participants are responsible for their shares of the decommissioning and reclamation obligations. If recovery of the Company's remaining investment in such facilities and the costs associated with early closure, including decommissioning, remediation, reclamation, and restoration, are not recovered from customers, it could have a material adverse impact on the Company's results of operations. Moreover, with the recent announcement of the proposed acquisition of an additional 25% interest in Unit 4, the Company also announced that it would enter into a power purchase agreement to sell power for approximately five years to the seller of the 25% interest. As announced, the Company will use the proceeds from those power sales to fund future remediation costs of Unit 4.



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The determination of which supply sources the Company utilizes to generate electricity is a complex decision that requires management expertise and regulatory review and approval (including from the MPSC) in order to ensure that customers have continued access to utility services that are affordable, reliable, and sustainable for the long-term.

The Proposal fundamentally interferes with management's decision-making and its ability to run the Company on a day-to-day basis by subjecting to shareholder oversight an aspect of the Company's business that is simply too complex to be subject to the oversight of shareholders.

**II. THE PROPOSAL MAY BE PROPERLY EXCLUDED UNDER RULE 14A-8(i)(3) BECAUSE IT IS CONTRARY TO THE COMMISSION'S PROXY RULES, INCLUDING RULE 14A-9, WHICH PROHIBITS MATERIALLY FALSE OR MISLEADING STATEMENTS IN PROXY SOLICITING MATERIALS.**

If the Staff does not concur that the Proposal may be excluded pursuant to Rule 14a-8(i)(7), then the Proposal should be excluded pursuant Rule 14a-8(i)(3), which permits a company to exclude a shareholder proposal if the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. Rule 14a-9 provides that no solicitation subject to Rule 14a-9 shall be made by means of any proxy statement "containing a statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading . . . ." As noted in Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB 14B"), unlike the other bases for exclusion under Rule 14a-8, Rule 14a-8(i)(3) explicitly references the supporting statement, in addition to the proposal as a whole.

The following statements in the Proposal are false and misleading:

- a. The Proposal states, "*[The Company] projects its carbon emission rates through 2038 to be very close to those in 2020, about 800 pounds of carbon dioxide per megawatt hour, most of which will come from [Unit 4].*"

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That statement is false and misleading. The Company's 2019 Electricity Supply Resource Procurement Plan ("Resource Plan")<sup>1</sup> indicates that the Company's carbon emission rate in 2020 is estimated to be about 840 pounds of carbon dioxide per megawatt hour, declining in 2038 to approximately 750 pounds of carbon dioxide per megawatt hour, a decline of over 10%.

Additionally, on December 10, 2019, the Company announced its carbon reduction vision statement for Montana, indicating it would reduce carbon emissions 90% by 2045 from 2010 levels.<sup>2</sup> As part of that announcement, the Company estimates its: 2020 carbon emissions in Montana will be 840 pounds; 2030 carbon emissions will be 740 pounds; 2040 carbon emissions will be 600 pounds; and 2045 emissions will be 280 pounds.<sup>3</sup>

- b. The Proposal states, *"the present remediation cost for groundwater contamination by Colstrip coal ash approaches \$700 million, of which [the Company] must pay its part, and [the Company's] future remediation costs will increase out of present proportion as other owners of Colstrip depart."*

That statement is false and misleading. The Company's share of future remediation costs will not increase as other owners of Colstrip depart. Pursuant to the existing owner and operator agreements among the owners, when an owner departs, it retains its future remediation obligations. Those obligations do not shift to any remaining owners simply because of a departure.

In addition, the \$700 million to which the Proposal refers is a misleading figure for several reasons. First, the Proposal portrays \$700 million as "the present remediation cost." However, \$700 million is only an estimate of *future* remediation costs. Second, \$700 million represents the high end of an estimated range. Finally, \$700 million does not relate to the Company's share of future remediation costs. Instead, it is an

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<sup>1</sup> See Figure 1-4 on p. 1-8 of the 2019 Electricity Supply Resource Procurement Plan, available at <http://www.northwesternenergy.com/docs/default-source/documents/defaultsupply/plan19/ch-2019-vol-1-final.pdf>.

<sup>2</sup> See announcement, available at <http://northwesternenergy.com/our-company/media-center/current/news-article/2019/12/10/North-Western-Energy-to-acquire-25-share-of-Colstrip-Unit-4-from-Puget-Sound-Energy>.

<sup>3</sup> See p. 29 of the Company's presentation at the Wells Fargo Energy Symposium, available at <http://www.northwesternenergy.com/docs/default-source/documents/investor/PresentationWellsFargo12102019.pdf>.



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estimate of future remediation costs for the entire Colstrip site and for all owners collectively.

There are three areas of the Colstrip site that will require future remediation: (1) the Units 1 and 2 effluent holding ponds; (2) the Units 3 and 4 effluent holding ponds; and (3) the plant site which is common to all four units. The misleading \$700 million estimate includes all three of these areas.

The Company does not own any share of Units 1 and 2 at Colstrip and thus has no remediation obligations related to those units. The Company currently owns only 30% of Unit 4, and as a result of sharing arrangements between the owners of Unit 3 and Unit 4, that results in an obligation of 15% of the remediation costs associated with Unit 3 and Unit 4 combined. Thus, the Company has a 15% share of the remediation costs associated with the Units 3 and 4 effluent holding ponds and a 15% share of Unit 3 and 4's share of the remediation costs associated with the common plant site. In addition, as previously mentioned, the Company will use the proceeds from the sale of power to the seller of the 25% interest in Unit 4 to fund the Company's associated future remediation costs.

While the precise amount of those remediation obligations is difficult to quantify today based on estimates of the future, it is easy to understand that a \$700 million estimate for future remediation costs for the entire Colstrip site (including all four units) is a misleading figure with respect to the Company's 30% ownership interest in just Unit 4.

- c. The Proposal states, *"Units 3 and 4, now 35 years old, continue to emit unlawful levels of hazardous air pollutants, requiring temporary shutdown in 2018, and an enforcement action by Montana DEQ is pending."*

That statement is false and misleading. Unit 4 does not continue to emit unlawful levels of hazardous air pollutants. As stated in the Proposal, the shutdown in 2018 was *temporary*. Since December 2018, the operator has performed monthly compliance testing which has continued to demonstrate compliance with emission requirements. And, while an enforcement action by Montana DEQ is pending against the operator, that action was filed, along with a consent decree settling the matter for a \$450,000 penalty. On November 29, 2019, the court approved the consent decree, resolving the violation.

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- d. The Proposal states, *“non-carbon emitting renewable energy sources such as improved hydroelectric generation, wind, and solar are less expensive and increasingly available in Montana.”*

That statement is false and misleading. Presumably, the Proposal intended to say that renewable energy sources are less expensive than thermal generation sources such as coal and natural gas. However, renewable energy sources are not less expensive than thermal resources. The Resource Plan, which is backed up by extensive modeling, concluded that meeting customers’ future needs with carbon free resources would cost \$523 million more than natural gas fired resources.<sup>4</sup> As stated in the Resource Plan:

[T]hermal resources provide the best value (lowest cost) to meet our customers’ future needs for peak capacity. Renewable resources and energy storage technologies are projected to continue to decline in cost, but are still more expensive than natural gas fired resources ... A portfolio which meets our customers’ future resource needs without the addition of any new carbon producing resources would lower carbon emissions, but at a cost. Meeting our customers’ future needs by adding carbon free resources is projected to cost \$523,000,000 more than meeting their needs using natural gas fired resources.

In addition, the Staff has made clear that references to external sources, such as a website, in a proposal may violate Rule 14a-9, and thus may be excludable under Rule 14a-8(i)(3). In Staff Legal Bulletin No. 14 (July 13, 2001), the Staff explained that a company may exclude from a proposal a website address under Rule 14a-8(i)(3) if information contained on the website is materially false or misleading. There, the Staff stated:

1. May a reference to a website address in the proposal or supporting statement be subject to exclusion under the rule?

Yes. In some circumstances, we may concur in a company’s view that it may exclude a website address under [R]ule 14a-8(i)(3) because

<sup>4</sup> See pp. 1-12 and 1-13 of the 2019 Electricity Supply Resource Procurement Plan, available at <http://www.northwesternenergy.com/docs/default-source/documents/defaultsupply/plan19/ch-2019-vol-1-final.pdf>



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information contained on the website may be materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules. Companies seeking to exclude a website address under [R]ule 14a-8(i)(3) should specifically indicate why they believe information contained on the particular website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules.

In *Freeport-McMoRan Copper & Gold Inc.* (Feb. 22, 1999), the Staff concurred in exclusion of certain quotations from newspaper articles in the supporting statement of a proposal under Rule 14a-8(i)(3) because such quotations were false and misleading.

In the supporting statement, the Proponent states, "Documents supporting this proposal are found at 350montana.org." However, it is not clear to the Company what those documents are. In fact, most of the information on the website is quite dated (from 2017 or earlier) and makes no reference to the Proposal. Even where the website attempts to reference the Company's resource procurement plan, the website contains a link to the Company's 2015 version of the plan. The Company had subsequently prepared and published an August 2019 version, which is cited above.

In SLB 14B, the Staff reiterated that modification or exclusion of all or a portion of a proposal or supporting statement is consistent with Rule 14a-8(i)(3) if the company "demonstrates objectively that a factual statement is materially false or misleading." See, e.g., *Ferro Corp.* (Mar. 17, 2015) (concurring in the exclusion of a proposal requesting the company to reincorporate in Delaware from Ohio because the proposal's supporting statement included false and misleading statements regarding Ohio law); *AT&T Inc.* (Feb. 2, 2009) (concurring in the exclusion of a proposal requesting an amendment to the company bylaws to implement a lead independent director position because the proposal's supporting statement misstated the independence standard of the Council of Institutional Investors). As indicated above, a number of the statements in the supporting statement (including specifically the statements that the Company's share of remediation costs will increase as owners depart Colstrip, that the Company's projected emissions rate will be the same in 2038, that Colstrip Units 3 and 4 continue to emit unlawful levels of hazardous air pollutants and that non-carbon emitting renewable energy sources are less expensive than thermal resources) are factually inaccurate and placed out of context such that it renders the supporting statement and the Proposal false and misleading.

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At times, the Staff will permit shareholders to make minor revisions to proposals that do not alter the substance of the proposal in order to eliminate the false or misleading statements. However, revision is appropriate only for “proposals that comply generally with the substantive requirements of [R]ule 14a-8, but contain some minor defects that could be corrected easily.” SLB 14B. In SLB 14B, the Staff noted that its “intent to limit this practice to minor defects was evidenced by [its] statement in SLB No. 14 that [they] may find it appropriate for companies to exclude the entire proposal, supporting statement, or both as materially false or misleading if a proposal or supporting statement would require detailed and extensive editing in order to bring it into compliance with the proxy rules.” As indicated above, more than one-third (4 out of eleven) paragraphs in the supporting statement contain misleading and inaccurate statements.

In SLB 14B, the Staff also stated that modification or exclusion of a proposal or supporting statement is consistent with Rule 14a-8(i)(3) where such proposal or supporting statement “directly or indirectly impugn[s] character, integrity, or personal reputation, or directly or indirectly make[s] charges concerning improper, illegal, or immoral conduct or association, without factual foundation.” *See, e.g., General Magic, Inc.* (May 1, 2000) (concurring in the exclusion of a proposal requesting the company make “no more false statements” to shareholders because the proposal created the false impression that the company had previously tolerated dishonesty when the company had corporate policies in place to the contrary). In the present case, the Proponent impugns the integrity of the Company by stating that the Company plant “continue[s] to emit unlawful levels of hazardous air pollutants.” This is false and intended to present the Company in a negative and harmful light and damage its reputation.

### CONCLUSION

On the basis of the foregoing, the Company respectfully requests that the Staff concur that it will not recommend enforcement action if the Company excludes the Proposal from its 2020 Proxy Materials for the 2020 Annual Meeting.

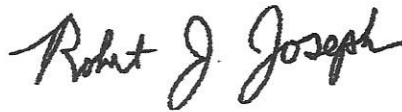


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If you have any questions regarding this request or need additional information, please contact me via phone at (312) 269-4176 or via email at [rjoseph@jonesday.com](mailto:rjoseph@jonesday.com).

Sincerely,

A handwritten signature in black ink that reads "Robert J. Joseph". The signature is written in a cursive, flowing style.

Robert J. Joseph

Attachments

Cc: Timothy P. Olson, Senior Corporate Counsel and Corporate Secretary, NorthWestern  
Corporation  
Thomas Tosdal