



for failure to state a claim upon which relief may be granted. The following brief is filed in support of this motion.

## **BRIEF IN SUPPORT OF MOTION TO DISMISS**

### **1. Factual Background.**

On February 10, 2010 the Petitioners filed their Petition with the Commission. The Petitioners seek various forms of relief, primarily related to the Commission approved charge for NorthWestern's streetlight infrastructure and replacing current streetlights with LED lighting. NorthWestern answered the Petition and raised affirmative defenses. The Petitioners' request for relief applies to NorthWestern's entire service area in Montana.

Petitioners Vern and Patricia Klingman claim standing based upon the fact that they are "individual customers of NorthWestern Energy and taxpayers in the City of Billings who are affected by local government taxes they pay [ . . .]". Petition p. 8 ¶¶ 5-6. Paul Williamson lives in Missoula and claims standing based upon his status as "an individual customer of NorthWestern Energy and a person affected by local government taxes levied on street lighting districts in the city and county where he lives and works." Petition p. 8 ¶¶ 7-8. Russell Doty lives in Billings and brings this Petition in his capacity as a "taxpayer of the City of Billings." Petition ¶¶ 9-10.

Substantively, the Petitioners are asking the Commission to force cities in Montana to use LED street lights on NorthWestern poles. The substantive issues raised in the Petition were raised in a prior proceeding before the Commission, Docket No. N2009.4.45. That docket culminated in Order No. 6998, issued on May 21, 2009, in which the Commission concluded that "After considering the comments received during

the roundtable process, the Commission finds that LED technology shows great promise, but it is not sufficiently developed to justify enactment of a rule mandating that electric utilities convert their existing lighting to LED technology at this time. The Commission will, therefore, close this docket and conclude its consideration of adopting an LED street and area lighting rule.” Order No. 6998, p. 3 ¶ 12.

Procedurally, the Petitioners ask that the Commission eliminate Commission approved charges for streetlight infrastructure and use that money to fund LED lighting, which is effectively a request for an interim decrease of Commission approved rates.

NorthWestern asks the Commission to dismiss the Petition for three reasons. First, the Petitioners’ lack of standing to bring the Petition. Second, the Petitioners’ substantive claims are barred by the doctrine of res judicata. Third, the Petitioners’ request for interim relief has no factual or legal basis and must be dismissed under M. R. Civ. P. 12(b)(6).

## **2. Legal Standard.**

A complaint may be dismissed under M. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted only if it appears beyond a doubt that the Petitioners can prove no set of facts that would entitle them to relief. *Sikorski v. Johnson*, 2006 MT 228, ¶ 11, 333 Mont. 434, ¶ 11, 143 P.3d 161, ¶ 11, Rule 12(b)(6) M. R. Civ. P. A Rule 12(b)(6) motion to dismiss has the effect of admitting all well-pled allegations in a complaint. *Id.*, citing *Dukes v. Sirius Construction, Inc.*, 2003 MT 152, ¶ 11, 316 Mont. 226, ¶ 11, 73 P.3d 781, ¶ 11. A determination on a motion to dismiss under Rule 12(b)(6) is a conclusion of law that is reviewed to determine whether the interpretation of the law is correct. *Dukes*, ¶ 11.

### 3. Argument.

#### A. The Petitioners' lack of standing to bring this action.

The power to adjudicate a case is limited to “justiciable controversies.” See, *Plan Helena, Inc. v. Helena Regional Airport Authority Bd.*, 2010 WL 438276 (Mont.), 2010 MT 26, ¶ 6 (Feb. 9, 2010, not yet released for publication), citing *Greater Missoula Area Fedn. v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881. This limitation is rooted in both constitutional requirements and policy or “prudential” considerations. See e.g. *Montana Power Co. v. Montana Public Service Commn.*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91 (ripeness doctrine is derived from both the constitution and judicial prudence); and see also *Olson v. Dept. of Revenue*, 223 Mont. 464, 469-70, 726 P.2d 1162, 1166 (1986) (standing doctrine also derives from both constitutional and policy considerations). A justiciable controversy is one upon which a final judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion. *Plan Helena, id.*, citing *Clark v. Roosevelt County*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48 (internal quotations omitted). The central concept of justiciability incorporates the more specific doctrine of standing, which is governed by its own set of substantive rules. *Plan Helena, id.* at ¶ 8, citing *Greater Missoula*, ¶ 23.

The question of standing addresses the litigant’s right to have the merits of the dispute decided. *Helena Parents v. Lewis & Clark Cty.* (1996), 277 Mont. 367, 371, 922 P.2d 1140, 1142 (citing *Warth v. Seldin* (1975), 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343). When standing is raised, the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue, and

not whether the issue is justiciable. *Helena Parents, id.*, 922 P.2d at 1142 (citing *Flast v. Cohen* (1968), 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947).

The Montana Supreme Court has stated that the following criteria must be satisfied to establish standing: (1) the complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. *Fleenor v. Darby School Dist.*, 2006 MT 31, ¶ 9, 331 Mont. 124, ¶ 9, 128 P.3d 1048, ¶ 9, also *Helena Parents*, 922 P.2d at 1142-43, citing *Sanders v. Yellowstone County* (1996), 276 Mont. 116, 119, 915 P.2d 196, 198; and also *Stewart v. Bd. of Cty. Com'rs of Big Horn Cty.* (1977), 175 Mont. 197, 201, 573 P.2d 184, 186. The Petitioners must have a direct interest and allege a specific harm in order to bring this action to the Commission for investigation. *Id.*

Nothing in the Petitioners' allegations explains how they are specifically harmed in a way that is unique to them and distinct from "harm" to the public generally. NorthWestern provides street and area lights, the costs of which are collected through Commission approved rates. The Petitioners' claim that NorthWestern's Commission approved rates should be eliminated and the money spent on LED lights. The Petitioners do not set forth how they are individually harmed by the current rates; nor do they explain how the "wrong" being perpetrated upon them will be remedied by a Commission decision in this case. If the Petitioners' claim is allowed to go forward, any taxpayer in Montana, who may not even be a customer of NorthWestern, may come to the Commission and ask that certain costs NorthWestern recovers through Commission approved rates be diverted to that individual's favorite project. The Petitioners' failure to

allege an injury that is unique to them individually and distinguishable from injury to the public generally mandates dismissal of this action for lack of standing. *Fleenor*, ¶ 9.

The Klingmans and Williamson allege standing based upon their status as taxpayers and customers of NorthWestern. Doty alleges standing based solely upon his status as a taxpayer. A citizen does not have standing to enforce a public right or to redress a public wrong simply by virtue of being a taxpayer. See, *Chovanak v. Matthews*, 120 Mont. 520, 188 P.2d 582 (1948)(a taxpayer did not have standing to challenge constitutionality of statute without showing an individual harm); see also *Carbon County v. Schwend*, 182 Mont. 89, 594 P.2d 1121 (1979)(an individual taxpayer cannot enforce a public right or redress a public injury by appeal where the taxpayer suffers injury common to all other taxpayers); and also *Fleenor v. Darby School Dist.*, 2006 MT 31, 331 Mont. 124, 128 P.3d 1048 (taxpayer's action against school district for an alleged violation of the right-to-know provision of the Montana Constitution failed to allege any injury in the complaint, let alone an injury unique to the taxpayer, and thus lacked standing to challenge the school district's action). Doty's only claim to standing is based upon his status as a taxpayer; he is not a customer of NorthWestern and does not allege any wrong that affects him personally. The Klingmans and Williamson likewise fail to allege any wrong that harms them personally. Their allegations are based entirely on their status as part of a generic group of people and the harm claimed is based upon a hypothetical set of facts that is unsupported by data. Therefore the Petition must be dismissed for lack of standing.

The gravamen of the Petition is a challenge to the legality of NorthWestern's rates. All of NorthWestern's rates are approved by the Commission, including the rates

that the Petitioners' complain about. Those rates cannot be simply "eliminated" and the monies diverted toward payment for LED lighting without Commission approval, which would necessarily take place only after due process was accorded NorthWestern and intervenors in the context of a rate case. Any action the Commission takes regarding the legality of NorthWestern's rates is subject to judicial review under the Montana Administrative Procedure Act. Where public officials are authorized to perform certain functions according to law, and there is a provision for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff. *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 92 S.Ct. 1361, 1364-65, 31 L.Ed.2d 636 (1972).

There is no statute that authorizes review of Commission approved rates at the request of an individual who has no direct interest in the matter. See generally Title 69. The Montana Constitution contains a provision establishing the Montana Consumer Counsel as the entity that is "the representative of the consuming public." See Article XIII, Section 2, Montana Constitution; see also § 69-2-201, MCA. In addition, the enforcement provisions of Title 69 limit enforcement of public utility law to specific entities. See, § 69-3-110, MCA. Section 69-3-321, MCA, limits complaints that the Commission may investigate to those that come from people "directly affected thereby."

Although the Montana Supreme Court has found that a taxpayer can bring an action when a statute expressly grants such authority, see *Druffel v. Board of Adjustment*, 339 Mont. 57, 168 P.3d 640, 2007 MT 220, it premised its conclusion upon the existence of a specific statutory grant of authority. *Id.*, citing § 76-2-327, MCA. In *Druffel*, the Court held that because there was express legislative intent in that statute to grant

standing to *any taxpayer* the right to petition for review, a citizen had standing to bring the claim by virtue of being a taxpayer. The holding in *Druffel* does not apply here. Section 69-3-321, MCA, specifically limits standing to bring a complaint to the Commission to any person *provided that such person is directly affected thereby* (emphasis added). Doty, who is not a customer of NorthWestern, has no standing to bring this action because he is not directly affected by the complained of rates. Williamson and the Klingmans do not have standing because they are not directly affected in a way that is unique to them and distinct from the consuming public generally. Given the specific statutory scheme that creates an avenue for the consuming public to challenge Commission action (here, the legality of NorthWestern's rates), coupled with the absence of specific statutory authority authorizing individual taxpayers to bring an action challenging Commission-approved rates, the Petitioners here lack standing to bring this action. The complaint must be dismissed for lack of standing.

The Petitioners' complaint completely fails to establish "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens presentation of issues." See, *Bryan v. District*, 2002 MT 264, ¶ 20, 312 Mont. 257, ¶ 20, 60 P.3d 381, ¶ 20, quoting *District No. 55 v. Musselshell County*, 245 Mont. 525, 528, 802 P.2d 1252, 1254 (1990). The Petitioners cannot rescue their complaint by alleging that they represent a broad class of people. The Petitioners allege that the addresses of "other interested persons in the class on whose behalf this action is being brought are too numerous to list." Petition ¶ 11. However, no class action has been certified and that is a specific procedural mechanism under the rules of civil procedure that the Petitioners have

not followed. Without class certification, they do not, and can not, individually purport to represent the interests of a class of people “too numerous to list.”

The Petitioners may attempt to argue that they have “representational standing” but that too must fail. Representational standing allows an organization or entity to bring a claim provided that there is an actual injury to the individual members. See *Associated Press, Inc. v. Montana Department of Revenue*, 2000 MT 160, ¶ 117, 300 Mont. 233, ¶ 117, 4 P.3d 5, ¶ 117 (Nelson, J., concurring), citing *Sierra Club v. Morton* (1972), 405 U.S. 727, 740-41, 92 S.Ct. 1361, 1369, 31 L.Ed.2d 636. For example, the Montana Supreme Court has allowed health care providers to assert their own rights as well as those of their patients who were not named parties. *Id.*, citing *Armstrong v. State*, 1999 MT 261, ¶ 13, 296 Mont. 361, ¶ 13, 989 P.2d 364, ¶ 13. In addition to the requirement that there are individual members suffering actual harm, there must be a sufficient nexus between the organization and the individuals. *Id.*, citing *Hunt v. Washington State Apple Adver. Comm'n* (1977), 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (setting forth the requirements to have representational standing). The Petitioners have not shown that they have representational standing to bring the claims on behalf of “other interested persons in the class on whose behalf this action is being brought” and the action must be dismissed.

To the extent that the Petitioners seek to void provisions contained in contracts that NorthWestern has with the City of Billing or other municipalities in the State, the Petitioners, who are not parties to those contracts, lack standing to bring their claims. See *Dick Anderson Const., Inc. v. Monroe Const. Co., L.L.C.* 2009 MT 416, ¶ 50, 353 Mont. 534, ¶ 50, 221 P.3d 675, ¶ 50, (finding that a party that is neither a party to a contract nor

a third party beneficiary of the contract does not have standing to challenge the contract). In *Dick Anderson Const.*, the Montana Supreme Court noted that “unless he is an *intended* third-party beneficiary of the contract, a stranger to a contract lacks standing to bring an action for breach of that contract.” *Id.*, ¶ 46, citing *Palmer v. Bahm*, 2006 MT 29, ¶ 13, 331 Mont. 105, 128 P.3d 1031 (emphasis and quotations in original); also citing Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, vol. 13, § 37:1 (4th ed., West 2000).

An intended third-party beneficiary to a contract must satisfy the following:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:

- (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
- (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

*Id.* at ¶ 47, citing the Restatement (Second) of Contracts § 302 (1981), and also citing *Harman v. MIA Service Contracts*, 260 Mont. 67, 72, 858 P.2d 19, 22-23 (1993).

The Petitioners are neither parties to the contractual agreements nor are they third party beneficiaries to those agreements. They therefore lack standing to challenge the contracts. The Petition should be dismissed.

There is nothing in the Petition that sets forth a specific harm as to the Petitioners that can be redressed in this action. The Petitioners make general allegations that the monies NorthWestern collects for the costs of street and area lights, which are collected

through Commission-approved rates, could be diverted and used for LED technology. This is simply an attempt to end-run the Commission's clear Order in N2009.4.45 that LED technology is not "sufficiently developed to justify enactment of a rule mandating that electric utilities convert their existing lighting to LED technology at this time." The Petitioners make no meritorious claim that the technology has changed in the few months since the Commission dismissed their rulemaking petition until now that justifies revisiting that decision.

The Petitioners' claims are barred because they lack standing to bring them. The Petitioners fail to allege any personal interest and injury, beyond the common interest of all citizens and taxpayers, and therefore this action should be dismissed. *Fleenor*, ¶ 9.

**B. The Petitioners' claims are barred by the doctrine of res judicata and collateral estoppel.**

The issues raised in this Petition were previously raised in Docket N2009.4.45, in which the Commission declined to initiate a rulemaking requiring utilities to replace existing HPSV street and area lights with LEDs, and the docket was closed. Res judicata and collateral estoppel provide a definite end to litigation and prohibit serial litigation of the same claim. *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267. Res judicata prohibits re-litigation of a previously-litigated cause of action. *Baltrusch, id.* ¶ 16. Collateral estoppel bars re-litigation of a previously-litigated issue. See, *McDaniel v. State*, 2009 MT 159, ¶ 28, 350 Mont. 422, ¶ 28, 208 P.3d 817, ¶ 28.

The same cause of action and the same issues were addressed in the Commission's decision in N2009.4.45. In that proceeding, the Commission entertained numerous comments, held a roundtable, took input from stakeholders, and concluded that

“After considering the comments received during the roundtable process, the Commission finds that LED technology shows great promise, but it is not sufficiently developed to justify enactment of a rule mandating that electric utilities convert their existing lighting to LED technology at this time. The Commission will, therefore, close this docket and conclude its consideration of adopting an LED street and area lighting rule.” Order No. 6998, p. 3 ¶ 12.

In filing this Petition, the Petitioners seek to re-litigate the same issues that were litigated in N2009.4.45. The Petitioners cloak their request in an interim rate decrease and ask that monies that are currently collected from Commission approved rates be re-directed immediately to installing LED lights. That procedural ploy does not change the substantive nature of the request, however. *Res judicata* bars a claimant from relitigating issues and claims decided in a former action or issues and claims that the litigant had an opportunity to litigate in the former action. *Balyeat Law, P.C. v. Hatch*, 284 Mont. 1, 3, 942 P.2d 716, 717 (1997). The Commission decided the issues raised here. In Order No. 6998, the Commission held that while LED technology may be promising, it is “currently at a developmental stage that does not warrant a mandatory street and outdoor lighting conversion program. The Commission therefore will not pursue an LED street and outdoor lighting rulemaking at this time.” Order 6998 Conclusion of Law ¶ 2, p. 3. The Petitioners did not seek judicial review of that Order.

*Res judicata* and collateral estoppel are based on a judicial policy favoring a definite end to litigation. *Kullick v. Skyline Homeowners Assn., Inc.*, 2003 MT 137, ¶ 17, 316 Mont. 146, ¶ 17, 69 P.3d 225, ¶ 17, citing *Rausch v. Hogan*, 2001 MT 123, ¶ 14, 305 Mont. 382, ¶ 14, 28 P.3d 460, ¶ 14. The doctrine applies if four factors exist: (1) the

parties are the same; (2) the subject matter of the present and past actions is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them. *Kullick, id.* ¶ 17. All four factors apply here. The Commission must dismiss this case because the Petitioners are seeking a second bite at the apple. The issues raised here have been decided, and the case should be dismissed.

In bringing this action the Petitioners are simply attempting an end-run at the Commission's dismissal of their rulemaking Petition in N2009.4.45. The Petitioners' addition of the procedural nuance of a request for interim relief does not change the fact that their claims are barred by the doctrine of res judicata. The Petition should be dismissed as having been previously litigated and decided.

**C. The Petitioners' request for interim relief must be dismissed.**

The Petitioners seek an interim decrease of NorthWestern's Commission approved rates, and ask that the monies be diverted and spent on LED street lights. The Petitioners advance this request under § 69-3-304, MCA. Section 69-3-304, MCA, provides that "an order of the commission approving or denying a temporary rate increase or decrease shall be based upon consistent standards appropriate for the nature of the case pending and shall be an intermediate agency action subject to judicial review under the Montana Administrative Procedure Act." (Emphasis added.)

The Commission rules addressing interim rate adjustments speak to rate increases, and do not address interim rate decreases. See A.R.M. § 38.5.501 *et seq.* Petitioners provide no legal basis to justify their request. NorthWestern is entitled to due process of law in a proceeding that will adjudicate NorthWestern's property interests. See, *Fuentes*

*v. Shevin*, 407 U.S. 67, 84-85, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *see also Montoya v. Blackhurst*, 84 N.M. 91, 93, 500 P.2d 176, 178 (1972); and also *Virginia Elec. & Power Co. v. State Corp. Comm'n*, 226 Va. 541, 312 S.E.2d 25, 28-30 (1984) (finding a violation of due process when a utility “was unaware that summary action was under consideration” and had “no opportunity to be heard”). Concerns of due process are particularly important in administrative agency proceedings because many of the customary safeguards associated with court proceedings are relaxed. *See, Virginia Elec. & Power Co.*, 101 Pub. Util. Rep. 4th (PUR) 41, 44 (Va. State Corp. Comm'n 1988); *cf. Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 109, 835 P.2d 819, 825 (1992).

The costs that NorthWestern recovers for its street and area lights are collected through Commission-approved rates. Section 69-3-110(2), MCA, provides that Commission approved rates are prima facie lawful until changed or modified by the Commission. Enforcement actions pertaining to Commission prescribed rules, practices and services must be brought “pursuant to the provisions of part 4 until the rules, practices, or services are changed or modified by the commission upon a satisfactory showing being made.” *Id.* Title 69, Part 4 addresses review of Commission actions and includes section 403, which sets forth the standards for seeking injunctive relief.

To the extent that the Petitioners are seeking injunctive relief, the provisions of § 69-3-403, MCA, require them to file their request in district court. Section 69-3-403(1), MCA. Before an injunction may be granted, the court shall require the party seeking the injunction “an undertaking [ . . . ] supported by responsible corporate surety, in such reasonable sum as the court shall direct, to the effect that the plaintiff will pay all

damages which the opposite party may sustain by reason of the delay or prevention of the order to the commission becoming effective [ . . .].” *Id.*

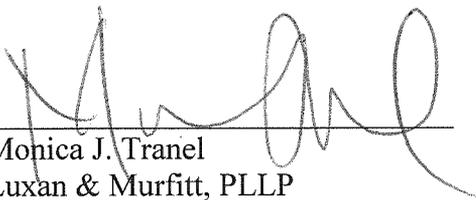
This procedural mechanism prohibits the Petitioners from seeking injunctive relief before the Commission. The Petitioners have not asserted any legal or factual basis upon which interim relief can be granted. The Petitioners have not set out the legal mechanism by which interim relief can be addressed by the Commission. There is no legal basis upon which an interim adjustment of NorthWestern’s Commission approved rates, which are prima facie lawful, may be granted without seeking a comprehensive review of all of NorthWestern’s rates. Injunctive relief is not available at the Commission.

The Petition must be dismissed and the Petitioners’ request for interim relief must be rejected.

**4. Conclusion.**

For the foregoing reasons, the Petitioners’ claims fail to state a claim upon which relief may be granted and the Commission should enter an Order dismissing the Petition with prejudice.

Respectfully submitted March 22, 2010.

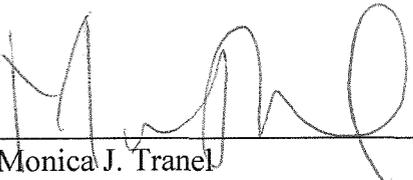


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**CERTIFICATE OF SERVICE**

I, Monica J. Tranel, certify that on the 22<sup>nd</sup> day of March, 2010, a true and accurate copy of the foregoing NORTHWESTERN ENERGY'S MOTION TO DISMISS AND BRIEF IN SUPPORT was duly served upon the parties listed below by depositing the same, postage prepaid, in the Unites States mail to:

Jason B Williams NorthWestern Energy 40 E Broadway St Butte, MT 59701-9394	Paul Williamson 506 Westview Dr Missoula, MT 59803
Russell L Doty 3878 N Tanager Ln Billings, MT 59102	Vern and Patricia Klingman 1020 14 <sup>th</sup> Street West Billings, MT 59102
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