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Attorney for NorthWestern Energy

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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|--|-----------------------|
| IN THE MATTER OF THE PETITION OF JAMES ) |                       |
| T. AND ELIZABETH A. GRUBA, LEO G. AND )  |                       |
| JEANNE R. BARSANTI AND MICHAEL W. AND )  |                       |
| FRANCES E. PATERSON, ON BEHALF OF )      |                       |
| THEMSELVES AND OTHERS SIMILARLY )        |                       |
| SITUATED, )                              | DOCKET NO. D2010.2.14 |
| Complainants, )                          |                       |
| VS. )                                    |                       |
| )  |                       |
| NORTHWESTERN ENERGY, )                   |                       |
| Defendant. )                             |                       |

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**NorthWestern Energy’s Reply Brief in Support of its  
Motion to Suspend Proceedings**

Pursuant to the Administrative Rules of the State of Montana (“ARM”) 38.2.1208, NorthWestern Corporation d/b/a NorthWestern Energy (“NWE”) submits this timely *Reply Brief in Support of its Motion to Suspend Proceedings* (“Motion”) in the above-captioned Docket. First, Complainants’ Response Brief (“Response”) is untimely and under the provisions of the ARM should not be considered by the Montana Public Service Commission (“Commission” or “PSC”). Notwithstanding the foregoing, the Complainants have failed to raise any issue in their Response, which addresses NWE’s

Motion to suspend this Docket. Additionally, the Complainants have misapplied Montana law with respect to NWE's Motion, by characterizing the Motion as seeking an injunction pending an appeal under Rule 62 of the Montana Rules of Civil Procedure. Likewise, Complainants failed to recognize the legal effect of the Montana Supreme Court's decision in Montana Consumer Counsel v Public Service Commission (1975), 168 Mont. 177, 541 P.2d 769, and other relevant law. Since Complainants apparently could not find and have not read this case, a copy of the decision is attached hereto.

### **Discussion and Analysis**

A) The Response is Untimely.

Pursuant to ARM 38.2.1208, an answer to a pleading must be filed within 20 days of the filing of the initial pleading. Under ARM 38.2.601(k), a motion is a pleading. NWE's Motion was filed on July 19, 2012, and the time within which Complainants were required to respond expired on August 8, 2012. The Response was not filed until August 13, 2012 and, therefore, should not be considered by the Commission.

B) Complainants' Appeal Divests the PSC of Jurisdiction.

As noted in NWE's Motion, it is well-established law that an appeal divests a lower court of jurisdiction. Complainants' Response has provided no authority to the contrary.

Quite simply, Complainants have asked the Montana Supreme Court to issue an order for an immediate rate reduction in this case. At the same time Complainants have asked the Commission to issue the same order. Thus, the same case is proceeding in both forums at the same time. Because Complainants have voluntarily elected to follow this path, the mandate found in the Montana Consumer Counsel case requires that the

Commission refrain from acting on this issue until the Montana Supreme Court issues its opinion on this matter.

Conclusion

Until the Montana Supreme Court decides the appeal filed by the Complainants, jurisdiction is removed from the PSC. Therefore, until that time, NWE requests that a suspension of proceedings be issued by the Commission in this case.

Respectfully submitted this 21<sup>st</sup> day of August, 2012.

NorthWestern Energy

By   
Ross P. Richardson  
Attorney for NorthWestern Energy

168 Mont. 177

Supreme Court of Montana.

MONTANA CONSUMER COUNSEL

Geoffrey L. Brazier, Plaintiff and Respondent,

v.

PUBLIC SERVICE COMMISSION of

Montana et al., Defendants and Respondents,

and

The Montana Power Company, a corporation,

Intervenor Defendant and Appellant.

No. 12944. | April 28, 1975.

Appellant power company moved for protective order to enjoin respondents from undertaking actions which interfered with Supreme Court's appellate jurisdiction. The Supreme Court held that actions of respondent Public Service Commission in reopening docket while appeal by power company was pending and issuing further orders in connection with challenged rate schedule filings were beyond jurisdiction of Public Service Commission.

Protective order issued.

West Headnotes (1)

1 **Public Utilities**

↳ Review and Determination in General

Actions of Public Service Commission in reopening its docket and issuing further orders in connection with challenged rate schedule filings and taking jurisdiction over several matters which were at issue in pending appeal before Supreme Court were beyond Public Service Commission's jurisdiction.

1 Cases that cite this headnote

**Opinion**

**\*\*769 \*177** The appellant has moved this Court for a protective order under the Rules of Appellate Civil Procedure on several grounds, the essence of which is that the appeal in this case is on issues directly concerning the legality,

interpretation, and scope of Public Service Commission Order #4147.

We heard the motion ex parte and ordered the respondents to appear to be heard on the motion.

Respondent Consumer Counsel appeared by a motion to remand to the district court, a motion to dismiss, and a petition for order.

**\*178** Respondent Public Service Commission appeared and argued orally.

This Court previously issued a stay order on January 8, 1975, staying execution of the judgment pending appeal and subject to this Court's authority to order refunds of over-collections.

This Court, in addition to examining the exhibits attached to the motion, has examined the combined brief with appendices in the appeal in this cause as well as the appeal in cause #12955, the McTaggart appeal.

Respondent Consumer Counsel, after seeking and receiving extensions of time for filing briefs on appeal, went back to the Public Service Commission to object to the rate schedule filings ordered in #4147; and the Public Service Commission, in an unusual order has denied the schedule and taken jurisdiction over several matters which are of issue in the appeal before this Court. Respondent Public Service Commission has not responded to the appeal in any manner and its counsel announced in open court that it did not intend to.

The protective order sought here is to enjoin the respondent Public Service Commission and the respondent Consumer Counsel from undertaking actions which interfere with this Court's appellate jurisdiction.

The actions of the Public Service Commission in reopening its docket and issuing further orders are beyond its jurisdiction.

**\*\*770** It is therefore ordered that:

1. The motion of respondent Consumer Counsel to remand to the district court is denied. Its motion to dismiss is denied. The petition for order is denied.

2. The Public Service Commission shall vacate, set aside and rescind its action and Order No. 4189 and shall forthwith act to enforce its Order No. 4147. The enforcement of said rate order shall be subject to the refund provision of this Court's stay order.

\*179 3. During the pendency of this appeal, the respondents Public Service Commission and Montana Consumer Counsel shall refrain from further actions which may tend to interfere with this Court's jurisdiction on appeal of this matter.

CASTLES, Acting C. J., and HASWELL, JOHN C. HARRISON and DALY, JJ., concur.

**Parallel Citations**

541 P.2d 769

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of August, 2012, a true copy of the foregoing was mailed by first-class mail, postage prepaid, addressed as follows:

Nedra Chase

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