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

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, )  
Complainants ) Docket No. D2010.2.14  
vs. )  
NorthWestern Energy, )  
Defendant )

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**NorthWestern Energy’s Reply to Complainants’ Amended  
Response and Request for a Hearing**

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NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) submits this *Reply to Complainants’ Amended Response and Request for a Hearing* (“Second Reply”) in the above-captioned Docket.

**Procedural Background**

On July 19, 2012, in response to the Complainants’ Amended Complaint certified by the Commission on July 3, 2012, NorthWestern filed a timely *Motion to Suspend Proceedings* (“Motion”). On August 13, 2012, Complainants filed a *Response Opposing Motion to Suspend*

*Proceedings* (“Original Response”) arguing that the Commission should not grant NorthWestern’s request to stay the proceedings because, despite NorthWestern’s contentions, the Commission has jurisdiction of this matter pending a decision by the Montana Supreme Court on Complainants’ appeal. On August 21, 2012, NorthWestern filed a timely *Reply Brief in Support of its Motion to Suspend Proceedings* (“First Reply”). NorthWestern’s First Reply argued that the Commission should not consider the Original Response as it was not timely filed nor did it address any substantive issue argued in NorthWestern’s Motion, including the case law cited by NorthWestern as controlling of this matter. See First Reply, p. 2. On September 4, 2012, Complainants filed an *Amended Response Opposing Motion to Suspend Proceedings and Renewed Motion for Temporary Rate Decrease*<sup>1</sup> (“Amended Response”) and a *Request for Hearing on NorthWestern’s Motion to Suspend Proceedings* (“Request for a Hearing”). NorthWestern submits this Second Reply in response to Complainants’ Amended Response and Request for a Hearing since the rules provide it with the last word as the moving party. See ARM 38.2.1208; see also Rule 2(a) of the Montana Uniform District Court Rules.

### **Discussion and Analysis**

NorthWestern’s Motion provides ample, good authority, which holds that Complainants’ appeal has divested the Commission of jurisdiction. Rather than provide the Commission with case law that holds otherwise, Complainants dismiss the case law as “immaterial, misapplied, or outdated.” See Amended Response, p.3. In addition, Complainants seek to limit the effect of *Montana Consumer Counsel v. Public Service Commission*, 168 Mont. 177, 541 P.2d 769 (1975) (“*Montana Consumer Counsel* case”), to a holding that applies to that case only by simply

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<sup>1</sup> With Complainants’ filing on September 4, they have changed the title of the pleading by including a “Renewed Motion for Temporary Rate Decrease.” NorthWestern has not addressed any of Complainants’ arguments in their Amended Response about the rate decrease, as it believes the Commission is without jurisdiction at this time to hear and decide the issue.

making a conclusory statement and not providing any facts to support their position.

Complainants also spend an exorbitant amount of time in both their Original Response and their Amended Response arguing how Rule 62(c) of the Montana Rules of Civil Procedure requires NorthWestern to post a bond prior to the Commission granting a request for a stay.

Complainants' reliance on this rule is improper. Rule 62(c), which has not been adopted by the Commission, only requires a bond to be posted if a stay is sought from an interlocutory order or final judgment that grants or denies an injunction. Complainants' appeal does not involve a request for an injunction. Thus, Rule 62(c) does not apply.

Additionally, the Commission should not consider either the Original Response or the Amended Response, as both were untimely and Complainant did not seek an extension from the Commission to file a late response. Last, the Commission should not grant a hearing<sup>2</sup> on this matter as this is purely a question of law to which no facts are in dispute.

*A) Complainants should have sought an extension or a waiver prior to the deadline for filing a response, not after.*

As was noted by NorthWestern in its First Reply, the Original Response was not filed until August 13, 2012, and therefore should not be considered by the Commission as it was untimely pursuant to ARM 38.2.1208. See First Reply, p. 2. Complainants concede that their Original Response was untimely, but attempt to provide an excuse for their tardiness by including in an endnote in the Request for a Hearing a June 10<sup>th</sup> email that was sent to NorthWestern's attorney at the time and the Commission's Chief Counsel, with a carbon copy to Kate Whitney at the Commission. In the email, Complainants' attorney requests copies, via email, of any documents filed in the case because he will be "traveling extensively." See Request

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<sup>2</sup> If Complainants meant to request oral arguments and not a hearing on NorthWestern's Motion, NorthWestern's position does not change. The case law provided in NorthWestern's First and Second Reply are clear and unambiguous and well-recognized law that the Commission must recognize as controlling of this matter.

for Hearing, p. 6. On July 19, 2012 — over five weeks later — NorthWestern filed its Motion with the Commission, but inadvertently failed to email a copy to Complainants’ attorney, as requested. Complainants further argue that if NorthWestern’s Motion had been emailed, as requested, Complainants “would have been able to respond.” *Id.* at p. 2.

First, it is not the responsibility of NorthWestern, or the Commission, to notify another party by email. Pursuant to ARM 38.2.1205(2), “[a]ll subsequent pleadings must be served either personally or by first class mail...” NorthWestern mailed a copy of its Motion to Complainants’ attorney and thus complied with the Commission’s administrative rule on service. Second, despite NorthWestern not emailing its Motion to Complainants, Complainants, upon learning of NorthWestern’s Motion, never asked NorthWestern for an extension of time to file a response. Furthermore, Complainants had the ability to request an extension from the Commission pursuant to ARM 38.2.312. This administrative rule provides a party the right to request an extension of time from the Commission for any deadline prescribed by the rules. ARM 38.2.312. It further provides that all requests must “be made before the expiration of the period originally prescribed...” *Id.* Thus, prior to August 8, 2012, the deadline for filing a response, Complainants should have filed a motion seeking an extension of time to file their response. Instead, Complainants decided to file their response after the deadline and not seek an extension prior to the expiration of the deadline.

Now, Complainants’ Request for a Hearing argues that the Commission should waive the administrative rule requiring a response to be filed within 20 days. See Request for a Hearing, p.1. Pursuant to ARM 38.2.305, the Commission can grant waiver of any of its rules if “good cause appears and as justice may require...” As discussed above, Complainants’ “good cause” is that their attorney requested to be served by email, which is not a required form of service under

the Commission's rules, and only learned of NorthWestern's filing by checking the Commission's online docket. See Request for a Hearing, p. 2. The problem here again is that upon learning of NorthWestern's filing, Complainants could have asked the Commission for an extension. By allowing a party to seek a waiver of a pleading deadline after substantial time has lapsed — in this case, 27 days after a request for an extension or a response was due — does not serve justice but prevents it, and the good cause that might have existed over a month ago is no longer valid. Moreover, the precedent that would be set by allowing a party to seek a waiver 27 days after a pleading deadline is surely a precedent that parties to Commission proceedings would eagerly note and follow. Just as in a court proceeding, a party should be expected to follow the rules of the tribunal and not be allowed to circumvent the rules when it suits their case. Based on the foregoing, the Commission should find that (1) Complainants had an opportunity to file a timely response by seeking an extension from the Commission and/or a waiver of an administrative rule, (2) by failing to do either prior to the expiration of the original deadline, Complainants failed to file timely responses, and (3) as a result, the Commission should not consider said response or subsequent responses when it rules on NorthWestern's Motion.

*B) Complainants should not get two bites at the apple.*

The Commission's administrative rules provide a moving party the right to file a motion (ARM 38.2.1501), the non-moving party the right to file a response to a motion (ARM 38.2.1208), and the moving party the right to file a reply to the response (ARM 38.2.1208). The Commission's rules do not provide parties the right to file a second response after the moving party files a reply. By allowing a non-moving party the opportunity to file a second response, the Commission is essentially allowing the non-moving party a second bite at the apple.

Notwithstanding the fact that Complainants' responses were untimely and should not be considered by the Commission, Complainants failed in their Original Response to address the case cited by NorthWestern in its Motion, as they claimed that NorthWestern was being untruthful to the tribunal by falsely quoting the case. See Original Response, p. 5-6. As it turns out, NorthWestern had *correctly cited and quoted the case*, but Complainants were unable to find the case. See First Reply, p. 2 and Request for Hearing, p. 3. Due to Complainants' inability to locate the case, NorthWestern provided a copy of the cited case by attaching it to its First Reply. Complainants' Amended Response now attempts to refute the case cited by NorthWestern. This analysis should have been done by Complainants in their Original Response since Complainants were given the correct cite by NorthWestern in its Motion. The Commission should ignore the arguments found in the Amended Response regarding the *Montana Consumer Counsel* case since Complainants had an opportunity to address this case in their Original Response, but did not due to their failure to perform adequate case law research.

C) *Complainants' Amended Response fails to refute the unambiguous, clearly applicable case law cited by NorthWestern as controlling in this matter.*

If the Commission decides to accept the Amended Response despite the fact that it was untimely and is a "second bite at the apple," NorthWestern disagrees with the statements made by the Complainants as to why the controlling case does not apply. Complainants argue that the case cited by NorthWestern as controlling is "immaterial, misapplied, or outdated" because the statute from which Complainants appeal, § 69-3-304, MCA, is an "appeal from an 'intermediate agency action'<sup>3</sup> subject to judicial review under the Montana Administrative Procedure Act." See Amended Response, p. 3. The fact is Complainants have appealed a decision to the Montana

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<sup>3</sup> It is interesting to NorthWestern that Complainants argue in their Amended Response that the appeal of the temporary rate reduction issue is an intermediate agency action and thus an interlocutory appeal since this is exactly the argument that NorthWestern and the Commission, in their Answer Brief of Appellees, made to the Montana Supreme Court when arguing that the Supreme Court was without jurisdiction to hear the matter.

Supreme Court. The Montana Supreme Court *might* rule that it is without jurisdiction as the matter from which Complainants appeal is an interlocutory matter. However, it *might not*. That decision is for the Montana Supreme Court to make and until it makes that decision, the Commission is without jurisdiction to act pursuant to the controlling case of *Montana Consumer Counsel v. Public Service Commission*, 168 Mont. 177, 541 P.2d 769 (1975).

Next, Complainants make the statement that the *Montana Consumer Counsel* case is “only meant to apply to the 1975 case ... and not to all subsequent cases on appeal from the PSC.” See Amended Response, p. 5. Complainants fail, however, to make any cogent showing as to why the Commission should agree with this as Complainants fail to provide any analysis for this statement or to identify any distinguishing facts. Complainants state that it is NorthWestern’s responsibility to show that the *Montana Consumer Counsel* case applies in this matter by reviewing the documents filed by The Montana Power Company to determine under what authority the utility sought a stay.<sup>4</sup> See Amended Response, p. 5. The procedural history of that case is as follows: the Montana Consumer Counsel filed an appeal of a decision by the Commission to allow the utility to increase its rates; the district court reversed the Commission’s decision holding that the Commission’s order, Order No. 4147, was invalid because the order contained an automatic adjustment charge; the utility appealed the district court decision to the Montana Supreme Court, which reversed the district court ruling and reinstated the Commission’s order. *Montana Consumer Counsel v. Public Service Commission*, 168 Mont. 180, 541 P.2d 770 (1975). After the utility filed an appeal with the Montana Supreme Court, the Commission issued a subsequent order, Order No. 4189, in the same docket as the appealed order, Order No. 4147. The Montana Consumer Counsel sought a stay via a protective order

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<sup>4</sup> Complainants’ statement about the utility requesting a stay in the *Montana Consumer Counsel* case is incorrect. The procedural history in that case, as discussed above, shows that the Montana Consumer Counsel is the party who sought a stay via a protective order.

from the Montana Supreme Court to stop the Commission Order No. 4189 from taking effect. The Supreme Court agreed with the Consumer Counsel and granted the protective order, finding that the Commission by issuing a subsequent order in the same matter was interfering with the Court's jurisdiction. *Montana Consumer Counsel v. Public Service Commission*, 168 Mont. 177, 541 P.2d 769 (1975). There is no limiting language or fact in the case's decision or facts that would warrant this Commission from not following that case's holding and precedent.

The holding in the *Montana Consumer Counsel* case is a well-known law which applies whether there is an appeal from an administrative agency or a district court decision. The Montana Supreme Court has repeatedly held that "an appeal to this Court stays all proceedings in the district court, thereby removing jurisdiction from that court to proceed further in the matter." *McCormick v. McCormick*, 168 Mont. 136, 138, 541 P.2d 765, 766 (1975). The Supreme Court also held that "an appeal to this court divests the district court of jurisdiction over the order or judgment from which the appeal is taken." *Hansen v. Hansen*, 129 Mont. 261, 264, 284 P.2d 1007, 1009 (1955).

Even though the cases previously cited held that a district court was without jurisdiction pending an appeal to the Supreme Court, the same principle should and does apply, pursuant to the *Montana Consumer Counsel* case, to this case. The Complainants have filed an appeal from a district court's order denying their request for a temporary rate reduction. After filing an appeal, Complainants, in their Second Amended Complaint, requested the Commission to temporarily reduce rates. The temporary rate reduction issue is clearly pending before the Supreme Court. The clear, unambiguous, well-recognized case law plainly holds that a lower court is without jurisdiction to proceed in a matter pending an appeal at the Supreme Court on the same matter.

The Commission therefore should stay the current proceeding, as requested by NorthWestern, pending the Supreme Court's decision on Complainants' appeal.

Complainants also argue that the case law is no longer precedent as Complainants assume that the case relied on prior statutes that are no longer the law. See Amended Response, p. 5-6. All of Complainants' arguments are based on assumptions. They have failed to show that in fact the case relied on an old, repealed statute.

*D) The Commission should deny the Complainants' Request for a Hearing as NorthWestern's Motion is purely a question of law that is clear and unambiguous.*

Complainants have requested that the Commission grant them an opportunity to be heard on NorthWestern's Motion pursuant to several administrative rules. See Request for Hearing, p. 1. Complainants look to ARM 1.3.212 as one of the administrative rules that allows a party the right to seek a hearing. Reliance on this ARM is incorrect. Pursuant to ARM 38.2.101, the Commission has adopted and incorporated certain rules from the Attorney General's Model Rules. ARM 1.3.212 is not one of the rules that the Commission has adopted and incorporated under ARM 38.2.101. Next, Complainants look to ARM 1.3.302 as another administrative rule that provides a party the right to be heard. ARM 1.3.302 provides that the "[Montana Administrative Procedure Act ("MAPA")] applies to all state agencies...." Mont. Code Ann. § 2-4-601, a MAPA statute governing contested cases, provides in pertinent part that "all parties must be afforded an opportunity for hearing after reasonable notice" in a contested case. Reliance on this statute is also misplaced.

The Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art II, § 17. "Procedural due process concerns and the concomitant right to notice and a hearing, do not arise unless there is an actual

or threatened deprivation of a person’s life, liberty or property.” *Emery v. State of Montana, Department of Public Health and Human Services, Child Support Enforcement Division*, 286 Mont. 376, 384, 950 P.2d 764, 769 (1997). NorthWestern’s Motion does not do any of those things — it will not deprive Complainants of their life, liberty or property. NorthWestern’s Motion only seeks a stay of the current proceeding before the Commission since the Commission is without jurisdiction to hear the matter pending Complainants’ Supreme Court appeal.

Alternatively, if the Commission believes that NorthWestern’s Motion could deprive Complainants of their life, liberty or property, Complainants’ procedural due process rights would not be violated if the Commission decided not to have a hearing on this matter. The Montana Supreme Court has held that “[d]ue process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute.” *Dowell v. Montana Department of Public Health and Human Services*, 2006 MT 55, ¶ 21, 331 Mont. 305, 132 P.3d 520 (citing *Matter of Peila*, 249 Mont. 272, 281, 815 P.2d 139, 144 (1991)). In this case, there are no facts in dispute. NorthWestern’s Motion simply presents a question of law that divests the Commission of jurisdiction on the matter pending a decision on the appeal. There are no facts that need to be taken into evidence in order for the Commission to rule on NorthWestern’s Motion. NorthWestern’s Motion presents the applicable law in this situation. A hearing or oral argument on this issue would be an ineffective use of the Commission’s time and resources as well as the parties’ time and resources as the cited case law is clearly applicable and unambiguous.

### **Conclusion**

Complainants failed to timely seek an extension or a waiver of an administrative rule for filing a response, and thus the Commission should not consider either the Original Response or

the Amended Response when ruling on NorthWestern's Motion. Notwithstanding the Complainants' untimely, unexcused responses, until the Montana Supreme Court decides the appeal filed by the Complainants, jurisdiction is removed from the Commission. Therefore, until that time, NorthWestern requests the Commission stay the proceedings in this case without a hearing.

Respectfully submitted this 14<sup>th</sup> day of September, 2012.

NORTHWESTERN ENERGY

By:   
Sarah Norcott  
Attorney for NorthWestern Energy

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of NorthWestern Energy's Reply to Complainants' Amended Response and Request for a Hearing in Docket D2010.2.14 has been served by mailing a copy thereof by first class mail, postage prepaid to the service list in this Docket and by hand-delivering to the Montana Public Service Commission and the Montana Consumer Counsel. This Motion has also been efiled with the PSC.

Date: September 14, 2012



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