

1 DEPARTMENT OF PUBLIC SERVICE REGULATION  
2 BEFORE THE PUBLIC SERVICE COMMISSION  
3 OF THE STATE OF MONTANA

\*\*\*\*\*

IN THE MATTER OF THE PETITION OF JAMES T. AND )  
ELIZABETH A. GRUBA; LEO G. AND JEANNE R. BARSANTI ON )  
BEHALF OF THEMSELVES & OTHERS SIMILARLY SITUATED, ) REGULATORY DIVISION  
Complainants. )  
VS. )  
NORTHWESTERN ENERGY, ) DOCKET NO. D2010.2.14  
Defendant. )  
)

4 \_\_\_\_\_  
5 **COMPLAINANTS' COMMENTS REGARDING NORTHWESTERN ENERGY'S COMMENTS**  
6 **CONCERNING COMPLAINANTS' SUBPOENA REQUEST<sup>1</sup>**

7 1. NorthWestern does not have standing to quash a subpoena of a Complainant  
8 witness. The witness, Mr. Smalley would have standing, however he knows of the subpoena  
9 request and does not object to it.

\_\_\_\_\_ <sup>1</sup> NorthWestern's footnote 1(of its comments emailed to me on February 4, 2014 at 4 PM) complains that Complainant's Subpoena Request has not been posted on the Commission's website. The hardcopy of our Request for Subpoena was received by NorthWestern (addressed to Nedra Chase) in Butte on Tuesday, January 28, 2014 at 1:08 PM (FedEx tracking number 804791275564); and emailed to Ms. Norcott on January 27, 2010. The Commission received email copies on January 27, 2014 and the written copy was delivered to the PSC on January 29, 2014 via US Mail (USPS Tracking # 9114901159815449491803).

Everybody got the document, so no harm, no foul. The subpoena is posted at the PSC web site with a posting date of January 29, 2014.

Further, I completed efilng that document with the PSC on January 30, 2014 at 8:45 PM (Confirmation Number: 19D619D628923) – five days before NorthWestern's lament. I also re-uploaded that document at the PSC website when Ms. George sent me an email that was not getting through my email account telling me she had not received my earlier uploads. The second upload of that document was completed on February 4, 2014 at 1:36 PM (Confirmation Number: 19EE19EE28923). I want to thank Ms. George and the Commission staff for helping me iron out the document submission process.

1           2. In paragraph number 1 of its comments NorthWestern questions the PSC' authority  
2 to issue a subpoena to an out-of-Montana witness. Of course the PSC has that authority. The  
3 Montana Rules of Civil Procedure, which also govern PSC procedure, provide for subpoena of  
4 out of state witnesses. The PSC must have authority to afford all parties to present evidence as  
5 provided in MCA § 2-4-612. Issuance of subpoenas no matter where witnesses live is part of  
6 that process. As I stated in a January 8, 2014 email to Commission staff and the parties after  
7 Ms. Norcott made this same argument in commenting on the proposed pre-hearing order:

8           Since MCA § **2-4-612. Hearing -- rules of evidence, cross-examination, judicial**  
9           **notice.** Provides: "(1) Opportunity shall be afforded all parties to respond and present  
10           evidence and argument on all issues involved," I have a right to call and subpoena any  
11           witness I wish subject to only appropriate objections as to foundation, etc. While  
12           NorthWestern may wish to prevent revelation of best lighting practices and costs, it  
13           simply has no standing to attempt to quash a subpoena of Mr. Smalley. A request to  
14           quash or enforce the requirements stated in the subpoena for reimbursement are up to  
15           Mr. Smalley.

16           **Two parts of M.R.Civ.P. govern issuance of subpoenas, which in this case would be a**  
17           **foreign subpoena as defined in Rule 28(c)(1) and explained in Rule 28(c)(2):**

18           **(c) Interstate Depositions and Discovery.**

19           **(1) Definitions.** For purposes of this rule:

20           (A) "Foreign jurisdiction" means a state other than Montana;

21           (B) "Foreign subpoena" means a subpoena issued under authority of a court of record  
22           of a foreign jurisdiction;

23           ...

24

25           **(2) Issuance of a Subpoena.**

26           (A) To request issuance of a subpoena under this section, a party must submit a foreign  
27           subpoena to a clerk of court in the county in which discovery is sought to be conducted  
28           in Montana. A request for issuance of a subpoena under this act does not constitute an  
29           appearance in the courts of this state.

30           **(B) When a party submits a foreign subpoena to a clerk of court in this state, the clerk,**  
31           **in accordance with that court's procedure, shall promptly issue a subpoena for service**  
32           **upon the person to which the foreign subpoena is directed.**

33           (C) A subpoena under subsection (B) must:

- 1 (i) incorporate the terms used in the foreign subpoena; and  
2 (ii) contain or be accompanied by the names, addresses, and telephone numbers of all  
3 counsel of record in the proceeding to which the subpoena relates and of any party not  
4 represented by counsel.

5 M.R.Civ.P., Rule 45 regulates the place-of-taking-of in Montana depositions only. It does  
6 not attempt to regulate the problem of enforcement of subpoenas out-of-state.  
7 Whether the state will honor a Montana subpoena is a question that depends on  
8 reciprocal arrangements between Montana and the state in question, and must be  
9 resolved ad hoc. Presumably, the state enforcing the Montana subpoena will in its order  
10 of enforcement make explicit the place where the deposition is to be taken.

11 In addition, the notations in the subpoena explain that the issuing body may set  
12 reasonable restrictions, such as expense reimbursement. The problem of subpoena  
13 enforcement will not materialize. And we have requested the Commission to allow  
14 some of our witnesses to testify via electronic hookups. Since the Commission allowed a  
15 Department of Energy witness to testify via phone (without my being forewarned of his  
16 existence) at the roundtable held when considering our request for a rulemaking  
17 requiring LED street lighting, there is some precedent for allowing a witness to testify by  
18 phone thus eliminating the requirement that he or she be paid mileage and other travel  
19 costs.

20 M.R.Civ.P., Rule 45(a)(2) & (3) provide (2) Except as provided in Rule 28(c)(2), a  
21 subpoena must issue from the court in which the action is pending.

22 (3) **Issued by Whom.** The clerk must issue a subpoena, signed but otherwise in blank, to  
23 a party who requests it. That party must complete it before service. An attorney also may  
24 issue and sign a subpoena as an officer of:

25 (A) a court in which the attorney is authorized to practice; or

26 (B) a court for a district where a deposition is to be taken or production is to be made,  
27 if the attorney is authorized to practice in the court where the action is pending.

28  
29 3. In paragraph number 2 of its Comments, NorthWestern objects to issuance of the  
30 subpoena by surmising that Mr. Smalley would be testifying on LED street lighting and  
31 contending by inference that consideration of LED street lighting is irrelevant to the issues  
32 proceeding to hearing in this docket. NorthWestern bases its contention on Order No. 7084f ¶¶  
33 17 and 20. However, that analysis ignores ¶ 10 of that order which provides:

34 10. The remaining issues on which the Commission ordered and received legal briefing  
35 relate to the remedies requested by Complainants in their Second Amended Complaint,

1 and therefore, the Commission need not decide these issues unless and until the  
2 Commission makes a finding in favor of Complainants. The arguments put forth by the  
3 parties, therefore, are taken under advisement.  
4

5 Thus, the remedy issues of what should be done regarding rebate of past overcharges,  
6 construction of future ownership charges, and whether the revenue from that should be  
7 applied to procure more efficient street lights are very much alive as permitted by PSC order  
8 No. 7084f.

9 While the PSC may not intend to decide remedy issues immediately, if the PSC rules for  
10 Complainant's by deciding that an overcharge exists, then it would be dealing with the plainly  
11 stated remedy requests that overcharges be allocated to the purchase of LED street lighting  
12 (See our Complaint ¶¶ B & C (page 3) and ¶ L (page 5), and ¶¶ IX, X, XI (page 2). Therefore,  
13 Complainants will exercise their right to develop a record on the issue of remedies. Judicial  
14 efficiency requires that if the Commission rules in Complainants' favor, there should be a record  
15 on which to craft remedies. That is the procedure in most all lawsuits—for example, one  
16 normally proves negligence and damages during the same trial.

17 Further, the Commission does not get to prejudge the testimony by willing witnesses  
18 prior to issuance of a subpoena. That is why Courts issue subpoenas in blank form for attorney's  
19 to fill in the names of those to be subpoenaed. Refusal to issue this subpoena unlawfully  
20 interferes with Complainants' right to present its case and denies Complainants due process of  
21 law guaranteed them by the US and Montana Constitutions.

22 And NorthWestern does not have standing to interpose a relevancy objection to  
23 issuance of a subpoena of Complainants' cooperative witness. The proper time for that

1 relevancy objection would be at the point when the testimony is offered. At that point, offers of  
2 proof and other appropriate motions can be made.

3 Mr. Smalley is manager of Street Light Engineering for Seattle City Light and currently  
4 handles government and legislative affairs for it. In that capacity he will offer testimony  
5 concerning how Seattle City Light's customers do not have to pay more than once for lights that  
6 have already been paid for—something (we will argue) that is decidedly different from the  
7 charges levied by NorthWestern.

8 Also, Mr. Smalley is the Director of the US Department of Energy's Municipal Solid State  
9 Lighting Consortium and he has stewarded Seattle City Light's mostly completed installation of  
10 40,000 LED street lights. As such, he is one of the premier witnesses in the world qualified to  
11 acquaint the PSC and NorthWestern with the benefits of similar projects; projects which are  
12 measurably reducing city budgets, as in the case of Los Angeles by \$7.5 million a year. And, he  
13 will also testify about maintenance savings and how these lights are reducing energy  
14 consumption by between 50% and more than 70% depending on how the lights are controlled.

15 NorthWestern claims to be worried about needless expenses caused by Mr.  
16 Smalley's testimony on LED matters. It would be refreshing if NorthWestern were equally as  
17 concerned about the needless expense caused by NorthWestern's failure to provide energy  
18 efficient LED street lighting to its customers.

19 Since the Commission often permits utilities and others to make presentations to it on  
20 topics of interest. Saving energy is relevant in this proceeding, at least as relevant as saving  
21 money by reducing an overcharge, precisely because saving energy also saves money. The  
22 statute we are proceeding under provides:

1 **69-3-321. Complaints against public utility -- hearing.** (1) The commission shall proceed,  
2 with or without notice, to make such investigation as it may deem necessary upon a  
3 complaint made against any public utility by ... any person, firm, or corporation,  
4 provided such person, firm, or corporation is directly affected thereby, that:

5 (a) any of the rates, tolls, charges, or schedules or any joint rate or rates are in any  
6 way unreasonable or unjustly discriminatory;

7 (b) any regulations, measurements, practices, or acts whatsoever affecting or  
8 relating to the production, transmission, delivery, or furnishing of heat, light,....,  
9 or any service in connection therewith is in any respect unreasonable,  
10 insufficient, or unjustly discriminatory; or

11 (c) any service is inadequate. [Emphasis added.]

12 Since Complainants' claim that existing street lighting is not only overpriced and unjustly  
13 discriminatory, but inadequate, unreasonable, and insufficient, preventing Mr. Smalley's  
14 testimony, would be abuse of discretion and therefor clear error.

15 Assuming arguendo that NorthWestern's assertion is correct and that the Commission is  
16 not going to consider Complainant's remedy requests concerning LED street lighting, then we  
17 have a right to make a record on that issue by tendering Mr. Smalley's completed testimony  
18 and making an offer of proof for the record on appeal and to make appropriate motions  
19 regarding that in light of paragraph 10 of its Order No. 7984f.

20 4. In paragraph number3 of its Comments, NorthWestern contends that it would be  
21 the one to subpoena Mr. Smalley for the purpose of responding to its discovery on his written  
22 testimony.

23 While NorthWestern would have the right to subpoena him as well, I am required to  
24 have Complainants' witnesses respond to data requests or have their testimony stricken.  
25 Therefore, it is entirely proper for that request to provide for production of such documents  
26 (i.e., via the subpoena duces tecum) included in the subpoena request, so I can fulfill the  
27 requirement to respond to data requests interposed by NorthWestern.

1 Respectfully submitted: February 6, 2014

2 \_\_\_\_\_  
3 By: Russell L. Doty

4 CERTIFICATE OF SERVICE

5 I certify that pursuant to ARM 38.2.313, 38.2.1209 and the Procedural Order dated January 16,  
6 2014, on February 6, 2014, an accurate copy of the foregoing **Complainants' Response to**  
7 **NorthWestern's Comment on our SUBPOENA Request in Docket No. D2010.2.14** were served upon the  
8 parties listed below in the manner provided:

<input checked="" type="checkbox"/> US Mail Original <input type="checkbox"/> Hand-deliver <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> E-mail:	Kate Whitney, Montana Public Service Commission 1701 Prospect Av, PO Box 202601 Helena, MT 59620-2601 Email: <a href="mailto:kwhitney@mt.gov">kwhitney@mt.gov</a>
<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> E-mail:	Laura Farkas, Montana Public Service Commission 1701 Prospect Av, PO Box 202601 Helena, MT 59620-2601 Email: <a href="mailto:lfarkas@mt.gov">lfarkas@mt.gov</a>
<input type="checkbox"/> US Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-delivery <input type="checkbox"/> XX E-mail:	Robert A. Nelson, Montana Consumer Counsel 111 North Last Chance Gulch Suite 1B Box 201703 Helena MT 59620-1703 Email: <a href="mailto:robnelson@mt.gov">robnelson@mt.gov</a>
<input type="checkbox"/> US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> XX E-mail:	Sarah Norcott, Esq., Attorney for NorthWestern Energy 208 N Montana Ave., Suite 205 Helena, MT, 59601 Email: <a href="mailto:sarah.norcott@northwestern.com">sarah.norcott@northwestern.com</a>
<input type="checkbox"/> US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> XX E-mail:	Leo Barsanti 3316 Pipestone Dr. Billings, MT 59102 Email: <a href="mailto:leoj47@msn.com">leoj47@msn.com</a>
<input type="checkbox"/> XX US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> XX E-mail:	Mary Wright, Montana Consumer Counsel 616 Helena Ave., Suite 300 PO Box 201703 Helena, MT 59620 Email: <a href="mailto:mwright@mt.gov">mwright@mt.gov</a>
<input checked="" type="checkbox"/> US MailX <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-delivery <input type="checkbox"/> XX E-mail:	Nedra Chase NorthWestern Energy 40 E. Broadway Butte, MT 59701-9394 Email: <a href="mailto:Nedra.Chase@northwestern.com">Nedra.Chase@northwestern.com</a>

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11 Russell L. Doty