

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) REGULATORY DIVISION
BEHALF OF THEMSELVES & OTHERS SIMILARLY SITUATED,)
Complainants.) DOCKET NO. D2010.2.14
VS.)
NORTHWESTERN ENERGY,)
Defendant.)

4
5
6 **COMPLAINANTS' MOTION TO RECONSIDER DENIAL OF SUBPOENA OF EDWARD SMALLEY**

7 1. Complainants' respectfully move for reconsideration of the PSC's February 25, 2014
8 denial¹ of their request for issuance of a subpoena to Edward Smalley because:

9 A) denial of the complainants' request is based on a misinterpretation of the law,

10 B) it is hard to fathom why the Commission would not permit complainants to present
11 as part of the remedy requested in this case, the premier witness in the country on
12 how US cities are saving millions of dollars and providing better roadway lighting by
13 converting to LED street lighting, and

14 C) a subpoena is necessary because Mr. Smalley is a government employee and,
15 although he knows of the subpoena request and does not personally object to it, we
16 anticipate from prior experience with government attorneys that they require that
17 he be subpoenaed.²

¹ Served on February 27, 2014.

² I informed Ms. Farkas and Messrs. Kraske & Decker and the parties in the case via email dated January 3, 2014 that "I will be requesting subpoenas pursuant to ARM 38.2.3302 for certain witnesses and it may be difficult to prepare prefiled testimony for them **because they** either **are government employees** or employees of NorthWestern Energy"

1 DISCUSSION

2 During the Commission work session where Complainants’ request for issuance of a
3 subpoena to Mr. Smalley was denied, it was asserted that the Commission rules do not provide
4 for subpoena of out-of-state witnesses and that there is no place where Commission Rules
5 adopted Rule 45 of the Montana Rules of Civil Procedure by reference, which it was said was
6 the basis for Complainants’ request.

7 Contending that Rule 45 must be adopted by reference before the Commission can
8 subpoena an out of state person overlooks Complainants’ extensive quotation of Rules
9 M.R.Civ.P. Rule 28(c)(1) and Rule 28(c)(2). M.R.Civ.P. They specifically addressing the foreign
10 subpoena issue.

11 Rule 28 is adopted by reference in Commission Rule 38.2.3301 which provides:

12 **38.2.3301** DISCOVERY

13 (1) Techniques of prehearing discovery permitted in state civil actions may be employed
14 in commission contested cases, and for this purpose **the commission adopts rules 26, 28**
15 **through 37 (excepting rule 37(b) (1) and 37(b) (2) (d) of the Montana rules of civil**
16 **procedure in effect on the date of the adoption of this rule, and any subsequent**
17 **amendments thereto.** In applying the rules of civil procedure to commission proceedings,
18 **all references to "court" shall be considered to refer to the commission;** references to
19 the subpoena power shall be considered references to ARM [38.2.3302](#) through
20 [38.2.3305](#); references to "trial" shall be considered references to hearing; references to
21 "plaintiff" shall be considered references to a party; and references to "clerk of court"
22 shall be considered references to the staff member designated to keep the official record
23 in commission contested cases. [Emphasis added]

24
25 Complainants have briefed the provisions of M.R.Civ.P., Rule 28(c)(1) and Rule 28(c)(2)
26 which specifically define a “foreign subpoena” to cover the situation involving Mr. Smalley as
27 follows:

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

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

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

5 (A) “Foreign jurisdiction” means a state other than Montana;

6 (B) “Foreign subpoena” means a subpoena issued under authority of a court of record of
7 a foreign jurisdiction;

8 ...

9
10 Since the Commission’s Rule ARM 38.2.3301 says “all references to ‘court’ shall be

11 considered to refer to the Commission,” the Commission is indeed empowered to subpoena a

12 non-Montana witness. Substituting the words “Commission,” etc. in M.R.Civ.P., Rule 28(c)(2)

13 we get:

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

15 (A) To request issuance of a subpoena under this section, a party must submit a
16 foreign subpoena to the Commission ~~a clerk of court~~ in the county in which discovery is
17 sought to be conducted in Montana. ...

18 **(B) When a party submits a foreign subpoena to the Commission ~~a clerk of court~~
19 in this state, the Commission staff clerk, in accordance with that Commission’s
20 court’s procedure, shall promptly issue a subpoena for service upon the person
21 to which the foreign subpoena is directed.**

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

23 (i) incorporate the terms used in the foreign subpoena; and

24 (ii) contain or be accompanied by the names, addresses, and telephone numbers
25 of all counsel of record in the proceeding to which the subpoena relates and of any
26 party not represented by counsel.

27
28 Complainants submitted the foreign subpoena to the Commission and its Secretary as
29 required by M.R.Civ.P., Rule 28(c)(2)(A) and ARM 38.2.3302.

30 M.R.Civ.P., Rule 28(c)(2)(B) says “the ‘Commission’ shall promptly issue a subpoena.”

31 The wording is not permissive. It is mandatory,³ requiring issuance since Commission procedure

³ The MAPA statute § 2-4-104 also contains the following mandatory language, “In furtherance of this power, an agency upon its own motion may and, upon request of any party appearing in a contested case, shall issue subpoenas for witnesses or subpoenas duces tecum.”

1 found in ARM 38.2.3302, ARM 38.2.3303 and M.R.Civ.P., Rule 28(c)(2)(C) are complied with.
2 Our request contained all information required by those provisions. ⁴

3 Even if the Commission decides at some future point that some portion of testimony
4 Mr. Smalley submits about how Montana ratepayers can save money is irrelevant,
5 Complainants still have the right under the statute⁵ and Commission rules⁶ to “present
6 evidence” on that issue or to make an offer of proof. Evidence on our remedy will be needed
7 for Commission consideration pursuant to paragraph 10 of its Order No. 7984f when we prove
8 the overcharge. Therefore, we propose to submit it for the record in written form as required
9 by Commission order like all other testimony. Further, a relevance object goes to the rules of

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

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

⁵ MCA 2-4-612 provides in pertinent part:

- (1) **Opportunity shall be afforded** all parties to respond and **present evidence and argument on all issues involved.**
- (2) Except as otherwise provided by statute relating directly to an agency, **agencies shall be bound by common law and statutory rules of evidence.** Objections to evidentiary offers may be made and shall be noted in the record. When a hearing will be expedited and the interests of the parties will not be prejudiced substantially, **any part of the evidence may be received in written form.**

⁶ See ARM [38.2.4208](#) OFFERS OF PROOF

(1) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained. The offer shall become a part of the record, but only for purpose of judicial review.

1 evidence, not civil procedure. Commission rule 38.2.4201(1) says: “In the conduct of its
2 hearings, the commission is bound to follow the common law and statutory rules of evidence,
3 2-4-612 (2), MCA. The Montana rules of evidence, as adopted by the Montana supreme court,
4 shall be applied in all contested cases.”

5 It was suggested at the PSC work session that the subpoena power did not cover a
6 request to produce pre-filed written testimony or responses to data requests. In evaluating that
7 assertion, please consider ARM [38.2.3302](#), which allows a subpoena to “... any party requiring
8 the production of books, way bills, papers, accounts, **and other documents** concerning material
9 testimony or information Such written application must set forth reasons supporting the
10 issuance of the subpoena for ... the production of ... other documents, as the case may be.

11 The “other documents” we need are prepared written testimony and responses to data
12 requests we receive about that testimony. There is nothing in the proceedings thus far that
13 would give us latitude to present Mr. Smalley as a later witness in this case as suggested during
14 the work session. If we do not present him initially, we would expect a motion from
15 NorthWestern to strike his testimony or to prevent him from testifying because he was not
16 presented as part of our *prima facie* case. In addition, the utility can be expected to make yet
17 another motion to dismiss if we do not have all of our ducks in a row concerning adoption of
18 the remedy we seek. Therefore, we simply cannot risk not doing what we need to do to present
19 our case.

20 Contrary to a representation at the work session, we did set forth reasons supporting
21 issuance of the subpoena and we elaborated on them (see footnote 4) as part of our objection
22 to NorthWestern’s objections concerning the subpoena.

1 If the Commission is going to require pre-filed testimony pursuant to ARM [38.2.4204](#),
2 then it must not deny due process by telling us we can't subpoena witnesses to provide that
3 testimony as we would be able to do if only oral testimony were required. Once the pre-filed
4 testimony procedure is invoked, we need to be able to do what is required to get timely pre-
5 filed testimony without having to risk not having it admitted later because it was not timely
6 pre-filed.

7 Further adoption by specifically referencing the number (45) of the other part of the
8 M.R.Civ.P. subpoena rules (45) is not necessary (as was asserted at the work session) because
9 the Montana Administrative Procedure Act (MAPA) statute and the Administrative Rules of
10 Montana (ARM) cover the issue by reference to the word "subpoena" in other ways. The
11 Commission's attention is respectfully called to MAPA § 2-4-104(1) which provides:

12 **2-4-104. Subpoenas and enforcement -- compelling testimony.** (1) An agency
13 conducting any proceeding subject to this chapter may require the furnishing of
14 information, the attendance of witnesses, and the production of books, records, papers,
15 documents, and other objects that may be necessary and proper for the purposes of the
16 proceeding. In furtherance of this power, an agency upon its own motion may and, upon
17 request of any party appearing in a contested case, shall issue subpoenas for witnesses
18 or subpoenas duces tecum. The method for service of subpoenas, witness fees, and
19 mileage must be the same as required in civil actions in the district courts of the state.
20 Except as otherwise provided by statute, witness fees and mileage must be paid by the
21 party at whose request the subpoena was issued. [Emphasis added]

22
23 Administrative Rules of Montana (ARM), Rule 1.3.232(1) provides:

24 [1.3.232](#) GENERAL PROVISIONS, SERVICE
25 (1) Unless otherwise provided by law and these rules, all motions and pleadings
26 **must be** served in accordance with the Montana Rules of Civil Procedure.
27 [Emphasis added]

28
29 Therefore, since it is clear that the Administrative Procedure Act adopts the Montana
30 Rules of Civil Procedure methods for service (which are found in Rule 45), no further reference

1 need be made in Commission Rules to a Rule 45 adoption by reference because the statute
2 covers it.

3 Also there should be no question about how a subpoena of an out of state witness is to
4 be enforced. That is covered under MAPA § 2-4-104(2)⁷

5 Therefore, pursuant to Commission Rule ARM 38.2.3303, the Commission Secretary or
6 any Commissioner may sign it. We again respectfully request that one of you do so and that you
7 honor our request to allow him to appear by phone or other electronic device.

8 Respectfully submitted: February 27, 2014

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10 _____
11 By: Russell L. Doty
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⁷ MAPA § 2-4-104(2): In case of disobedience of any subpoena issued and served under this section or of the refusal of any witness to testify as to any material matter with regard to which the witness may be interrogated in a proceeding before the agency, the agency may apply to any district court in the state for an order to compel compliance with the subpoena or the giving of testimony. If the agency fails or refuses to seek enforcement of a subpoena issued at the request of a party or to compel the giving of testimony considered material by a party, the party may make an application to the district court. The court shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unjustified, the court shall enter an order requiring compliance. Disobedience of the order must be punishable by contempt of court in the same manner and by the same procedures as is provided for similar conduct committed in the course of civil actions in district courts. If another method of subpoena enforcement or compelling testimony is provided by statute, it may be used as an alternative to the method provided for in this section.

