

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

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6 COMPLAINANTS' MOTION FOR CLASS CERTIFICATION

7
8 MOTION

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10 Complainants respectfully move the Commission to order:

- 11 A. That this Docket be certified as a class action involving persons in the street lighting
12 customer class who are subject to NWE's ELDS-1 ownership charge, NWE's ESS-1
13 energy charge assessed to ELDS-1 customers and NWE customers assessed an ELDS-
14 1 billing charge on customer owned street lights.
15 B. In the alternative, if the Commission does not certify a class action, the Complainants
16 move the Commission to state clearly that the scope of these proceedings
17 encompasses testimony on all persons subject to NWE's ELDS-1 ownership charge
18 and that includes all persons and entities in the street lighting customer class.
19

20 BRIEF SUPPORTING MOTION

21 To certify a proposed class, Complainants must satisfy all four of the requirements of
22 *Mt.R.Civ.P 23 (a) & Fed. R. Civ. P. 23(a)*. To meet *Fed. R. Civ. P. 23(a)*'s prerequisites,
23 Complainants must demonstrate that: (1) the class is so numerous that joinder of all members is
24 impracticable; (2) there are questions of law or fact common to the class; (3) the claims or
25 defenses of the representative parties are typical of the claims or defenses of the class; and (4)
26 the representative parties will fairly and adequately protect the interests of the class.

1 Clearly Complainants are seeking a class action.¹ As set forth below Montana’s Supreme
2 Court positively recognizes that Complainants are members of a utility street lighting customer
3 class. Complainants cannot say for certain how many bills NWE sends to class members because
4 NWE refuses to enlighten us on the meaning of its Street Light Account numbering system,² and
5 NWE has not provided complete information on how many utility-owned street lights are in its
6 system.³ We do know, however, that there are tens of thousands of street lights in hundreds of
7 lighting districts. Therefore, (1) the class members are so numerous that joinder of all members
8 is impracticable.

9 We know from the pleadings and pre-filed written testimony that the claims of Barsantis
10 and Grubas are similar to those of other class members. Barsantis live and pay property taxes
11 (for street lighting) in Billings SILMD 228 and Grubas live and pay property taxes (for street
12 lighting) in Billings SILMDs 161 & 162. They have alleged an overcharge exists in more than
13 80% of the Billings SILMDs including their own.⁴ Complainant witness Towe has demonstrated

¹ See Complaint ¶¶ 16, 78, 89, 98, 133, 145 & 149 - 152; Barsanti Pre-filed Direct Testimony, pp. 41 - 44; Gruba Testimony, pp. 19 - 20.

Complaint ¶ 16 pled:

- 16) Addresses of other interested persons in the class on whose behalf this action is being brought are too numerous to list. They include:
 - a. all street lighting districts within service areas of Northwestern Energy, a company which is under the jurisdiction of the PSC,
 - b. all customers of those lighting districts,
 - c. all taxpayers who support those lighting districts,
 - d. all users of area lighting within the service area of Northwestern Energy, a company which is under the jurisdiction of the PSC,
 - ...
 - f. various consumer, environmental, business and industry groups, and news media in Northwestern Energy’s service area, ...

² See NWE non-response to C-066.

³ See NWE non-response to C-067, C-044, C-045, C-046 & C-047.

⁴ See Complainants’ Exhibits 3 & 10.

1 that NWE is not applying MSA § 69-3-109 properly because it is collecting revenues in excess
2 of the original cost of utility property in lighting districts where NWE owns the street lights.

3 Thus, the claims of all class members arise from a common course of conduct by the
4 Defendant. Second, if a class is not certified, all class members will have to engage in the same
5 detailed discovery to compile a common body of data as is now underway in this case. In
6 addition, all class members will have to engage in the same analysis of the data to establish the
7 factual basis for each of the elements of a manipulation claim in violation of MSA § 69-3-109.
8 These elements are: (1) the defendant possessed an ability to create a depreciation procedure that
9 permitted it to collect more via its tariff than the original cost of utility infrastructure; (2) a
10 manipulated artifice existed, allowing for inflated earnings; (3) the defendant caused the artifice;
11 and (4) the class members were injured because of the artifice.

12 Therefore, (2) there are questions of law and fact common to the class; and (3) the claims
13 of the representative parties are typical of the claims of the class.

14 Further, to meet the Rule 23(a) requirement, the lead Complainants' counsel must be
15 "qualified, experienced, and generally able to conduct the proposed litigation," and the class
16 representatives must not have interests conflicting with the class. *In re Livent Noteholders Sec.*
17 *Litig.*, 210 F.R.D. 512, 517 (S.D.N.Y. 2002) ("Livent"). Both of these requirements are satisfied
18 here.

19 As illustrated by the thoroughness of the petition and discovery sought by Complainants
20 and by the experience of Complainants' attorney as a former Commission Counsel and
21 Minnesota Contract Administrative Law Judge presiding in utility rate cases, (4) the
22 representative parties will fairly and adequately protect the interests of the class.

1 The Grubas and Barsantis have no conflict of interest with other members of the
2 proposed class. Indeed, the interests of this class have been ignored for decades by other utility
3 watchdogs. Complainants are certainly more adept at fairly and adequately protecting the
4 interests of the class than has been demonstrated by the former PSC chair who now heads
5 NorthWestern.

6 Pursuant to the requirements of *Mt.R.Civ.P 23 (b)(1 & 2) Fed. R. Civ. P. 23(b)(1 & 2)*:

7 A class action may be maintained if Rule 23(a) is satisfied and if:

8 **(1)** prosecuting separate actions by or against individual class members would create a
9 risk of:

- 10 (A) inconsistent or varying adjudications with respect to individual class members that
11 would establish incompatible standards of conduct for the party opposing the class; or
12 (B) adjudications with respect to individual class members that, as a practical matter,
13 would be dispositive of the interests of the other members not parties to the individual
14 adjudications or would substantially impair or impede their ability to protect their
15 interests;

16 **(2)** the party opposing the class has acted or refused to act on grounds that apply
17 generally to the class, so that final injunctive relief or corresponding declaratory relief
18 is appropriate respecting the class as a whole; or

19

20 The requirement in paragraph 2 is met because NWE persists in its claim that the relief
21 sought herein should only apply to customers in the Billings Town Code and not to its other
22 street lighting customers.

23 The requirements of paragraph 1(A) are met because incompatible standards of conduct
24 would be established if the relief granted to Barsantis and Grubas and customers of the Billings
25 Town Code were not also applied to street lighting customer class members located outside of
26 the Billings Town Code.

27 Despite this clarity about Complainants seeking a class composed of the street lighting
28 customer class, NorthWestern Energy (NWE) continues to obstruct justice by refusing to
29 respond completely to complainants' discovery. For example, when Complainants sought

1 information relating to all street lights in entire system, NWE disingenuously contended
2 “Complainants’ complaint involves street lights in the City of Billings and more specifically,
3 street lights in Billings Special Improvement Lighting & Maintenance Districts (“SILMDs”)” In
4 responding to those data requests, NWE provided only a portion of the information in its Billings
5 Town Code.⁵ Complainants clearly pled allegations involving NWE’s entire street lighting
6 system and filed testimony involving NWE’s entire system.⁶

7 Complaint ¶ F sought not only elimination of \$63,258 in monthly overcharges in Billings,
8 but “elimination of similar overcharges occurring in all Montana street lighting districts or other
9 installations served by Northwestern Energy....”

10 Complaint ¶ 191 pled “Each month that Northwestern stalls in providing requested data
11 in discovery tendered as a result of this proceeding will cost taxpayers in Northwestern’s
12 Montana service area outside of Billings more than \$180,000/month.”

13 NWE also twists the facts to misapply this Commission’s Order by contending that
14 because “The Commission dismissed a couple from the complaint who did not live in a City of
15 Billings street lighting district, ... this docket does not relate to all of NorthWestern’s street
16 lights.” That couple (Patersons) was dismissed because Patersons did not live in a lighting
17 district. While they live in Billings, the dismissal limited the class to those in lighting districts,
18 not to those located in Billings lighting districts. Complainants living in lighting districts outside
19 of Billings would not have been dismissed.

20 Apparently, in order for customers in lighting districts located outside the Billings Town
21 Code area, NWE would have the Commission require the joinder of complainants in this case

⁵ See NWE non-response to C-067, C-044, C-045, C-046 & C-047.

⁶ See Complaint ¶¶ F, 183 – 184, 191 - 192; Barsanti Testimony pp. 56 & 57;

1 from every town and county in NWE's service area. That is clearly not required to have the
2 Commission deal with NWE's pervasive profiteering, which Complainants have proven exists
3 almost everywhere that NWE-owned street lights have been in service for more than 15 years.

4 Those in the street lighting customer class of which Complainants are a part are also a
5 part of this case precisely because they also are subject to the ownership charge in
6 NorthWestern's ELDS-1 tariff.

7 When this case was remanded back to the Public Service Commission from *Williamson v.*
8 *Montana Public Service Commission*, 272 P.3d 71, 364 Mont. 128, 149-150, 2012 MT 32 (Mont.
9 2012), the Montana Supreme Court noted at ¶ 5 & ¶ 48:

10 ¶ 5 NorthWestern directly bills the members of the street and area lighting
11 class for the provision of street lighting service. Included within this class are
12 municipalities, such as the City of Billings and the City of Missoula, which pay the street
13 lighting bills to NorthWestern. Property owners in the street lighting districts do not pay
14 NorthWestern directly for the provision of street lighting service. But, as discussed
15 below, Appellants contend that the property owners ultimately pay for the service
16 because the city assesses the property owners within each district for the costs of the
17 street lighting, as reflected by separate lines on their property tax bills.

18 ...

19 ¶ 48 First, as to the Grubas' and the Barsantis' standing, the PSC and the District
20 Court interpreted "directly affected" to mean that only the customers in the street and
21 area lighting class— i.e., the cities and counties— have standing to challenge
22 NorthWestern's rates and charges for street lighting service. In other words, only the
23 parties that write the check directly to NorthWestern for the street lighting bill are
24 directly affected by the rates, charges, and service. We cannot agree that this restrictive
25 construction is consistent with the intent of § 69-3-321(1), MCA. **The statute grants
26 standing to "persons," not just "customers," and the critical language is "directly
27 affected," not "directly pays." Under the PSC's approach, large categories of
28 persons could be precluded from pursuing legitimate complaints in the PSC through
29 the mere expedient of structuring customer classes, rate classifications, and billing
30 practices such that consumers pay energy fees to an intermediary which in turn
31 pays NorthWestern directly. ... [Emphasis added]**

32
33 At page 19 of Jim Gruba's pre-filed direct testimony, Complainants' attorney
34 summarized the record for purposes of noting class action standing, explaining:

1 The combined \$721.85 (\$652.60 +69.25) overcharge assessment imposed on
2 Grubas because of their involvement in SILMDs # 161 and 162, directly affected their
3 property tax payment. That is a personal interest beyond the common interests they have
4 as taxpayers with other taxpayers.

5 Thus, Grubas are persons directly affected by the improper rates and profiteering
6 imposed via the private/public partnering which results in the revenue/tax collection
7 procedure harming Grubas and others. That is, the rates imposed on Grubas, which were
8 at least \$721.85 too high, directly affected them because their cumulative property tax
9 bill over the last 7 2/3 years in SILMD # 161, and 13 2/3 years in SILMD # 162, became
10 approximately \$721.85 too high.

11 **Other persons who are property taxpayers in SILMDs 161 and 162 and other**
12 **SILMDs where NorthWestern Energy owns street lights that have been fully paid**
13 **for are similarly situated to Grubas. [Emphasis added]**
14

15 As was noted in *In Re: Natural Gas Commodities Litigation*, (U.S. Dist. Ct.,

16 SD NY), 231 F.R.D. 171; 2005 U.S. Dist. LEXIS 22130; 164 Oil & Gas Rep. 505:

17 The Second Circuit has directed courts to adopt a liberal interpretation of *Rule 23* in order
18 to maximize the benefits to private parties and, in cases such as this one involving alleged
19 manipulation of public markets, benefits to the public provided by class actions. See
20 *Sumitomo I*, 182 F.R.D. at 89; *Sumitomo II*, 194 F.R.D. at 481. As the Second Circuit stated
21 in *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968), "if there is to be an error made,
22 let it be made in favor and not against the maintenance of the class action, for it is always
23 subject to [*179] modification should later developments during the course of the trial so
24 require." (quoting *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968)).
25

26 Thus, Complainants request certification of the class as requested.

27 Respectfully submitted.

April 16, 2014

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29 

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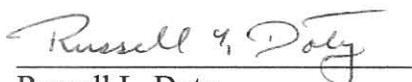
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CERTIFICATE OF SERVICE

I certify that pursuant to ARM 38.2.313, 38.2.1209 and the Procedural Order dated January 16, 2014, on April 16, 2016, an accurate copy of **Complainants' Motion for Class Certification in Docket No. D2010.2.14** were served upon the parties listed below in the manner provided:

<input type="checkbox"/> XX US Mail Original <input type="checkbox"/> Hand-deliver <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> XX E-mail:	Kate Whitney, Montana Public Service Commission 1701 Prospect Av, PO Box 202601 Helena, MT 59620-2601 Email: kwhitney@mt.gov
<input type="checkbox"/> XX US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> XX E-mail:	Laura Farkas, Montana Public Service Commission 1701 Prospect Av, PO Box 202601 Helena, MT 59620-2601 Email: lfarkas@mt.gov
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