

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. )**  
**DOCKET NO. D2010.2.14**  
**NORTHWESTERN ENERGY, )**  
**Defendant. )**

---

4  
5  
6 **COMPLAINANTS' REPLY TO NWE'S OPPOSITION TO**  
7 **MOTION FOR CLASS CERTIFICATION**

8  
9 **REPLY BRIEF SUPPORTING MOTION**

10 This paragraph will add to the discussion in Complainants' Brief Supporting Motion  
11 concerning the numerosity requirement (Rule 23 (a)(1)) to class action certification. Despite  
12 NWE's refusal to provide its Form 1 Report to the Federal Regulatory Energy Commission  
13 (FERC), Complainants have been able to secure access to that report via FERC's online  
14 database. NorthWestern's Form 1 for 12/31/2012, reported 3,665 as the Average Number of  
15 Public Street & Highway Lighting Customers for its Montana Operations. (page 304.1, line 19,  
16 column d). Certainly joining 3,665 street lighting customers in this proceeding would be  
17 impractical. So they ought to be represented as a class.

18 Further, the 2012 Form 1 shows that NWE earned a whopping \$0.2699 per kWh from the  
19 sale of 15,258 kWh per customer (15,094,644 total kWh) of electricity to its 3,664 Montana  
20 Public Street Lighting Operation customers. Compared that \$0.2699 per kWh charged in  
21 Montana to the \$0.1076 per kWh charged NWE's 146 South Dakota Public Lighting customers  
22 for the sale of 86,295 kWh of electricity per customer (totaling 1,356,192 kWh).

1           The large discrepancy in these two revenue per kWh of electricity sold numbers  
2 apparently was overlooked in past regulatory proceedings. Also overlooked has been the alleged  
3 purposeful manipulation of accounting methods applied to NWE’s street lighting customer class  
4 which Complainants seek to represent. Complainants’ raising of this discrepancy is further  
5 indication that Complainants have met the fair and adequate representation requirements of Rule  
6 23 set forth in Complainants’ original brief on this matter.

7           NWE contends that because the Montana Consumer Council (MCC) has intervened in the  
8 case, there is no need for class certification. However, the MCC is tasked by Article XIII,  
9 Section 2 of Montana’s Constitution with representing “... consumer interests in hearings before  
10 the public service commission...” Consumer interests among the various customer classes are  
11 not always the same. While we acknowledge the fine commitment the MCC had made to  
12 protecting Montana consumers, we also note that typically, the MCC has represented the  
13 residential consumers while other attorneys have represented larger users. Also, in the past, the  
14 MCC appears to have been a part of rate cases where individuals in various SILMDs have been  
15 forced to pay ownership rates beyond when those rates plus applicable carrying charges have  
16 paid for the infrastructure in an SILMD--cases where the street lighting charge per kWh has risen  
17 to \$0.2699/kWh, far above the per kWh cost in other consumer classes. Additional  
18 discrimination has been permitted to happen where consumers in some SILMDs have helped  
19 defray the costs for consumers in other SILMDs. Therefore, the fact that the MCC is involved in  
20 the case does not demonstrate that representation by the MCC of the street lighting customer  
21 class has been or will be adequate. Indeed, the MCC has yet to determine whether it will weigh  
22 in on the side of Complainants in the case. Separate representation by Complainants’ is

1 warranted in much the same way that separate representation of commercial and large scale  
2 customers often occurs in utility rate cases.

3 NWE contends that Complainants' statements that Grubas and Barsantis have no interests  
4 conflicting with the other class members are without factual support. NWE alleges no conflict in  
5 support of its claim that non-conflict requirement is not satisfied. If conflicts were alleged,  
6 Complainants could address them. If the Grubas and Barsantis can establish that when  
7 consumers in the various SILMDs have paid for their street lights, the ownership charge should  
8 cease or be tiered and greatly reduced to eliminate the portion of the ownership charge relating to  
9 recovering the original cost of the lights plus the allowed rate of return, the interest of all street  
10 lighting customers will be served. Thus, there is no conflict of interest involved in raising that  
11 issue.

12 With regard to NWEs claim that no facts support the adequacy of representation being  
13 provided by Complainants' lead counsel, NWE chose to overlook the following facts stated in  
14 Complainants' Brief support the motion for class certification:

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

20 If further facts are needed, the Commission may note that Complainants lead Counsel  
21 also has passed the bar in three states (Montana, Minnesota and Colorado), and successfully  
22 represented the Metropolitan Deaf Senior Citizens in obtaining telecommunications devices for  
23 the deaf in Minnesota, the Minnesota Radio Common Carrier Association during the breakup of  
24 AT&T, and the North Dakota Bar Association during an ethics investigation of a Minnesota  
25 Public Service Commissioner.

1 NWE's only other objection to certification of a class stems from a claim that the  
2 Commission is not empowered to act pursuant to Rule 23 of the Montana Rules of Civil  
3 Procedure.

4 First, class actions before administrative agencies have been permitted. See the reference  
5 to the Chief Administrative law Judge (CALJ) in *Azdell v. Office of Personnel Management*,  
6 87 M.S.P.R. 133, (October 20, 2000), where the Merit System Protection Board (MSPB)  
7 decision noted:

8 Counsel requested that the appeal be heard as a class appeal pursuant to 5 C.F.R.  
9 § 1201.27 and Rule 23 of the Federal Rules of Civil Procedure, named Ann S. Azdell and  
10 Donald B. Fishman as class representatives, and suggested that the appropriate class  
11 should include all applicants under Examination Announcement No. 318 who were not  
12 veterans. *Id.* The Board reassigned the appeal from the Washington Regional Office to  
13 the Board's CALJ on May 19, 1997. IAF, Tab 17. **The CALJ granted the appellants'**  
14 **request for the appeal to be heard as a class appeal**, and he designated the class as all  
15 nonpreference eligible candidates who were on the ALJ register as of February 7, 1997.  
16 IAF, Tab 21 [Emphasis added]

17  
18 *Azdell* is admittedly distinguishable from this case in that Rule 5 C.F.R. § 1201.27  
19 expressly provided for class action based on Rule 23. While there is no such expressed rule  
20 granting the PSC express authority here, the PSC has implied authority based on the fact that if it  
21 were to grant individual relief only to Complainants and those in the Billings Town Code (as  
22 NWE appears to be contending is possible), the PSC would be applying the resulting tariff  
23 unequally, thus denying street lighting consumers outside the Billings Town Code the benefit  
24 achieved in this case and forcing other cities and towns to go through the same lengthy process  
25 to establish tariffs applied to their street lights.

26 By refusing to respond to data requests and other discovery concerning its entire Montana  
27 Street Lighting Customer class, NWE is attempting to limit consideration in this proceeding to  
28 the Billings area. When the Commission crafts relief to SILMDs in the Billings area, it will be

1 required by law to apply that relief evenly across the entire customer class in order for approved  
2 rates to be just and not discriminate against customers outside of NWE’s Billings Town Code.

3 That is the Commission may reduce the ownership charge to zero after the rates defray  
4 the original cost of the lights, but it must do so for the entire street lighting customer class--not  
5 just street lighting customers in the Billings Town Code. Likewise, the Commission may reduce  
6 the ownership charge to eliminate that portion of it that has defrayed original cost, but it must do  
7 so for the entire street lighting customer class. Or, the Commission may implement LED lighting  
8 that will make for more adequate service by reducing the energy component of the ELSD-1 tariff  
9 by 50%, but that too must apply to all street lighting (or at least all street lighting where the  
10 original cost of the lights has been completely covered). That law requiring such equal treatment  
11 is found in:

12 **Montana Constitution, Article II, Section 4.** ...No person shall be denied the  
13 equal protection of the laws....

14 **and**

15 **69-3-201. Utilities to provide adequate service at reasonable charges.** Every  
16 public utility is required to furnish reasonably adequate service and facilities. The charge  
17 made by any public utility for any heat, light, power, water, or regulated  
18 telecommunications service produced, transmitted, delivered, or furnished or for any  
19 service to be rendered as or in connection with any public utility shall be reasonable and  
20 just, and every unjust and unreasonable charge is prohibited and declared unlawful.

21  
22 Complainants rely on their Brief in Support of Motion discussion of Rule 23

23 requirements and NWE’s attempt to limit these proceedings to only a portion of the street  
24 lighting customer class, which will not be repeated here.

25 **SUMMARY**

26  
27 Therefore, Complainants respectfully move the Commission to order:

- 28 A. That this Docket be certified as a class action involving persons in the street lighting  
29 customer class who are subject to NWE’s ELDS-1 ownership charge, NWE’s ESS-1  
30 energy charge assessed to ELDS-1 customers and NWE customers assessed an ELDS-  
31 1 billing charge on customer owned street lights.

1 B. In the alternative, if the Commission does not certify a class action, the Complainants  
2 move the Commission to state clearly that the scope of these proceedings  
3 encompasses testimony on all persons subject to NWE's ELDS-1 ownership charge  
4 and that includes all persons and entities in the street lighting customer class.  
5

6 Respectfully submitted.

June 6, 2014

7  
8   
9 \_\_\_\_\_  
Russell L Doty, Attorney for Complainants

10 3957 W. 6<sup>th</sup> St.

11 Greeley, CO 80634-1256

12 Phone: 406-696-2842

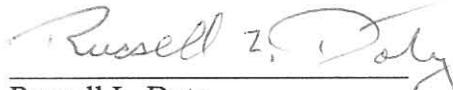
13 Email: [iwin4u1@earthlink.net](mailto:iwin4u1@earthlink.net)

14

CERTIFICATE OF SERVICE

I certify that pursuant to ARM 38.2.313, 38.2.1209 and the Procedural Order dated January 16, 2014, on June 6, 2016, an accurate copy of **Complainants' Reply to NWEs' Opposition to 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: <a href="mailto:kwhitney@mt.gov">kwhitney@mt.gov</a>
<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: <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 type="checkbox"/> xx US Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-delivery <input type="checkbox"/> XX E-mail:	Tracy Lowney Killoy NorthWestern Energy 40 E. Broadway Butte, MT 59701-9394 Email: <a href="mailto:Nedra.Chase@northwestern.com">Nedra.Chase@northwestern.com</a>

  
 \_\_\_\_\_  
 Russell L. Doty