

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

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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' REPLY TO NWE RESPONSE TO COMPLAINANTS' MOTION  
7 REQUIRING NORTHWESTERN TO RESPOND ADEQUATELY TO  
8 COMPLAINANTS' THIRD SET OF DISCOVERY OR FACE SANCTIONS

9  
10 BRIEF SUPPORTING MOTION

11 A) NWE asserts (Response Brief p. 2) "... there is no rule of civil procedure that  
12 requires an attorney to sign discovery responses." Perhaps counsel overlooked Rule 26 (g) of  
13 Montana's Rules of Civil Procedure, which have been adopted (as acknowledged by NWE) by  
14 ARM § 38.2.3301(1). It provides:

15 (g) Signing Disclosures and Discovery Requests, Responses, and Objections.

16 (1) Signature Required; Effect of Signature. Every disclosure under Rule 26(b)(4) and  
17 every discovery request, response, or objection must be signed by at least one  
18 attorney of record in the attorney's own name -- or by the party personally, if  
19 unrepresented -- and must state the signer's address. By signing, an attorney or party  
20 certifies that to the best of the person's knowledge, information, and belief formed after a  
21 reasonable inquiry:

22 (A) with respect to a disclosure, it is complete and correct as of the time it is made;  
23 and

24 (B) with respect to a discovery request, response, or objection, it is:

25 (i) consistent with these rules and warranted by existing law or by a good faith  
26 argument for extending, modifying, or reversing existing law;

27 (ii) not interposed for any improper purpose, such as to harass, cause unnecessary  
28 delay, or needlessly increase the cost of litigation; and

29 (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs  
30 of the case, prior discovery in the case, the amount in controversy, and the importance of  
31 the issues at stake in the action.

1           (2) **Failure to Sign. Other parties have no duty to act on an unsigned disclosure,**  
2 **request, response, or objection until it is signed, and the court must strike it unless a**  
3 **signature is promptly supplied after the omission is called to the attorney's or**  
4 **party's attention.**

5           (3) Sanction for Improper Certification. If a certification violates this rule without  
6 substantial justification, the court, on motion or on its own, must impose an appropriate  
7 sanction on the signer, the party on whose behalf the signer was acting, or both. **The**  
8 **sanction may include an order to pay the reasonable expenses, including attorney**  
9 **fees, caused by the violation.** [Emphasis added]

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11           In any event that discrepancy appears to have been resolved by Ms. Norcott's  
12 representation that her signing of NWEs response brief ought to be considered as her having  
13 signed the actual discovery response.

14           **B) Discovery not limited to ownership charge issue.** NWE contends that it does not  
15 have to answer some of Complainants' discovery because it is irrelevant since the issues in the  
16 case have been limited to consideration of the "ownership charge" issue the PSC has chosen to  
17 consider. That is an improper reading of the scope of discovery. Rule 26 of Montana's Rules of  
18 Civil Procedure which have been adopted (as acknowledged by NWE) by ARM § 38.2.3301(1)  
19 provides:

20           (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in  
21 accordance with these rules, the scope of discovery is as follows:

22           (1) Scope in General. Unless otherwise limited by court order, the scope of discovery  
23 is as follows: **Parties may obtain discovery regarding any non-privileged matter that**  
24 **is relevant to any party's claim or defense** -- including the existence, description,  
25 nature, custody, condition, and location of any documents or other tangible things and the  
26 identity and location of persons who know of any discoverable matter. **The information**  
27 **sought need not be admissible at the trial** if the discovery appears reasonably  
28 calculated to lead to the discovery of admissible evidence. All discovery is subject to the  
29 limitations imposed by Rule 26(b)(2)(C). [Emphasis added]

30  
31           Complainants are therefore allowed to seek information relevant to all of Complainants'  
32 claims regardless of whether or not that information is admissible. Such information is necessary  
33 to support Complainants' offers of proof because it will leads to evidence that becomes part of  
34 the trial record as an offer of proof.

1           **C) NWE asserts (Response Brief, p. 9) that Complainants cite no statutory authority**  
2 **for contending that NWE’s failure to make discovery requests may be sanctioned by the**  
3 **Commission.** The authority resides in Mt. R. Civ. P., Rule 37, adopted by ARM § 38.2.3301(1)  
4 [except for paragraphs (b)(1) and (b)(2)(d).<sup>1</sup> That rule is part of Montana’s statutes (Title 25,  
5 Chapter 20). It states:

6           **Rule 37. Failure to Make Discovery; Sanctions.**

7           (a) Motion for an Order Compelling Discovery.

8           (1) In General. On notice to other parties and all affected persons, a party may move  
9 for an order compelling discovery. The motion must include a certification that the  
10 movant has in good faith conferred or attempted to confer with the person or party failing  
11 to make discovery in an effort to obtain it without court action.

12           (2) Appropriate Court. A motion for an order to a party must be made in the court  
13 where the action is pending. A motion for an order to a nonparty must be made in the  
14 court where the discovery is or will be taken.

15           (3) Specific Motions.

16           (A) To Compel a Discovery Response. A party seeking discovery may move for an  
17 order compelling an answer, designation, production, or inspection. This motion may be  
18 made if:

19           (i) a deponent fails to answer a question asked under Rule 30 or 31;

20           (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or  
21 31(a)(4);

22           (iii) a party fails to answer an interrogatory submitted under Rule 33; or

23           (iv) a party fails to respond that inspection will be permitted -- or fails to permit  
24 inspection -- as requested under Rule 34.

25           (B) Related to a Deposition. When taking an oral deposition, the party asking a  
26 question may complete or adjourn the examination before moving for an order.

27           (4) Evasive or Incomplete Answer or Response. For purposes of this subdivision (a),  
28 an evasive or incomplete answer or response must be treated as a failure to answer or  
29 respond.

30           (5) Payment of Expenses; Protective Orders.

31           (A) If the Motion is Granted or Disclosure or Discovery is Provided After Filing. If  
32 the motion is granted -- or if the requested discovery is provided after the motion was  
33 filed -- the court must, after giving an opportunity to be heard, require the party or  
34 deponent whose conduct necessitated the motion, the party or attorney advising that  
35 conduct, or both to pay the movant’s reasonable expenses incurred in making the motion,  
36 including attorney fees. But the court must not order this payment if:

37           (i) the movant filed the motion before attempting in good faith to obtain the discovery  
38 without court action;

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<sup>1</sup> The Commission Rule appears to need updating to correctly reference recent changes made to the Rules of Civil Procedure.

- 1 (ii) the opposing party's response or objection was substantially justified; or  
2 (iii) other circumstances make an award of expenses unjust.

3 (B) If the Motion is Denied. If the motion is denied, the court may issue any protective  
4 order authorized under Rule 26(c) and must, after giving an opportunity to be heard,  
5 require the movant, the attorney filing the motion, or both to pay the party or deponent  
6 who opposed the motion its reasonable expenses incurred in opposing the motion,  
7 including attorney fees. But the court must not order this payment if the motion was  
8 substantially justified or other circumstances make an award of expenses unjust.

9 (C) If the Motion is Granted in Part and Denied in Part. If the motion is granted in part  
10 and denied in part, the court may issue any protective order authorized under Rule 26(c)  
11 and may, after giving an opportunity to be heard, apportion the reasonable expenses for  
12 the motion.

13 (b) Failure to Comply With a Court Order.

14 (1) Sanctions in the District Where the Deposition is Taken. If the court where the  
15 discovery is taken orders a deponent to be sworn or to answer a question and the  
16 deponent fails to obey, the failure may be treated as contempt of court.

17 (2) Sanctions by the Court Where the Action is Pending.

18 (A) For not Obeying a Discovery Order. If a party or a party's officer, director, or  
19 managing agent -- or a witness designated under Rule 30(b)(6) or 31(a)(4) -- fails to obey  
20 an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a),  
21 the court where the action is pending may issue further just orders. They may include the  
22 following:

23 (i) directing that the matters embraced in the order or other designated facts be taken  
24 as established for purposes of the action, as the prevailing party claims;

25 (ii) prohibiting the disobedient party from supporting or opposing designated claims or  
26 defenses, or from introducing designated matters in evidence;

27 (iii) striking pleadings in whole or in part;

28 (iv) staying further proceedings until the order is obeyed;

29 (v) dismissing the action or proceeding in whole or in part;

30 (vi) rendering a default judgment against the disobedient party; or (vii) treating as  
31 contempt of court the failure to obey any order except an order to submit to a physical or  
32 mental examination.

33 (B) For not Producing a Person for Examination. If a party fails to comply with an  
34 order under Rule 35(a) requiring it to produce another person for examination, the court  
35 may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party  
36 shows that it cannot produce the other person.

37 (C) Payment of Expenses. Instead of or in addition to the orders above, the court must  
38 order the disobedient party, the attorney advising that party, or both to pay the reasonable  
39 expenses, including attorney fees, caused by the failure, unless the failure was  
40 substantially justified or other circumstances make an award of expenses unjust.

41 (c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

42 (1) Failure to Disclose or Supplement. If a party fails to provide information requested  
43 in accordance with these rules or fails to disclose information regarding opinions of a  
44 witness as required by Rule 26(b)(4), the party is not allowed to use that information or  
45 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was  
46 substantially justified or is harmless. In addition to or instead of this sanction, the court,

1 on motion and after giving an opportunity to be heard:

2 (A) may order the payment of the reasonable expenses, including attorney fees, caused  
3 by the failure;

4 (B) may inform the jury of the party's failure; and

5 (C) may impose other appropriate sanctions, including any of the orders listed in Rule  
6 37(b)(2)(A)(i)-(vi).

7 (2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if  
8 the requesting party later proves a document to be genuine or the matter true, the  
9 requesting party may move that the party who failed to admit pay the reasonable  
10 expenses, including attorney fees, incurred in making that proof. The court must so order  
11 unless:

12 (A) the request was held objectionable under Rule 36(a);

13 (B) the admission sought was of no substantial importance;

14 (C) the party failing to admit had a reasonable ground to believe that it might prevail  
15 on the matter; or

16 (D) there was other good reason for the failure to admit.

17 (d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or  
18 Respond to a Request for Inspection.

19 (1) In General.

20 (A) Motion; Grounds for Sanctions. The court where the action is pending may, on  
21 motion, order sanctions if:

22 (i) a party or a party's officer, director, or managing agent -- a person designated under  
23 Rule 30(b)(6) or 31(a)(4) -- fails, after being served with proper notice, to appear for that  
24 person's deposition; or

25 (ii) a party, after being properly served with interrogatories under Rule 33 or a request  
26 for inspection under Rule 34, fails to serve its answers, objections, or written response.

27 (B) Certification. A motion for sanctions for failing to answer or respond must include  
28 a certification that the movant has in good faith conferred or attempted to confer with the  
29 party failing to act in an effort to obtain the answer or response without court action.

30 (2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is  
31 not excused on the ground that the discovery sought was objectionable, unless the party  
32 failing to act has a pending motion for a protective order under Rule 26(c).

33 (3) Types of Sanctions. Sanctions may include any of the orders listed in Rule  
34 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the  
35 party failing to act, the attorney advising that party, or both to pay the reasonable  
36 expenses, including attorney fees, caused by the failure, unless that failure was  
37 substantially justified or other circumstances make an award of expenses unjust.

38 (e) Failure to Provide Electronically-Stored Information. Absent exceptional  
39 circumstances, a court may not impose sanctions under these rules on a party for failing  
40 to provide electronically-stored information lost as a result of the routine, good-faith  
41 operation of an electronic information system.

42 (f) Failure to Participate in the Framing of a Discovery Plan. If a party or its attorney  
43 fails to participate in good faith in the framing of a discovery plan by agreement as is  
44 required by Rule 26(f), the court may, after opportunity for hearing, require that party or  
45 attorney to pay to any other party the reasonable expenses, including attorney fees,  
46 caused by the failure.

1           **D) NWE failed to admit the REWRITE OF C-057**, RFA 36, which stated:

2  
3           1) Please admit that in June of 2009, the \$0.56 month per light operations charge and a  
4           \$0.54/month per light maintenance charge levied on each street light NorthWestern  
5           owned in Billings SILMDs was not levied on city owned lights in Billings SILMDs.

6  
7           NWE's persists in contesting the relevance and timeliness of this request and other  
8 requests. Since NWE's response to MCC-001 indicates the ownership charge may include in it  
9 more than what is necessary to cover original cost plus allowed rate of return, it is important to  
10 determine the components of the "carrying charge" and their reasonableness. In addition, as set  
11 forth more fully in Complainants Brief Supporting this motion, Complainants' have raised  
12 billing issues that require a record separating out what charges are made for what service.

13           Rather than continue to argue about the reasons for NWE's failure to admit,  
14 Complainants' seek an alternative remedy, namely Complainant's request that:

15           **... pursuant to MCA § 2-4-612 (6), the Commission is asked to take notice of its**  
16 **ELDS-1 tariff, which provides for charges to both utility-owned and customer-owned lights**  
17 **and to accept as true the C-057 statement which should have been admitted.**

18           Montana's Administrative Procedures Act, MCA § 2-4-612 (6), provides:

19  
20           Notice may be taken of judicially cognizable facts. In addition, notice may be  
21 taken of generally recognized technical or scientific facts within the agency's  
22 specialized knowledge. Parties shall be notified either before or during the hearing  
23 or by reference in preliminary reports or otherwise of the material noticed,  
24 including any staff memoranda or data. They shall be afforded an opportunity to  
25 contest the material so noticed.

26           **E) NWE has refused to respond to C-075, C-076, C-079, C-082, C-083, C-085, C-086,**  
27 **C-087, and C-088** based on its claim that it is not required to respond to these data requests  
28 because they exceed the 50 written interrogatories allowed under Mt.R.Civ.P., Rule 33(a)(1)  
29 without Commission approval.

1 Complainants asked the Commission to permit additional interrogatories. NWE counters  
2 that such request was not timely. However, ARM § 38.2.312 on which NWE relies to support its  
3 theory is not applicable here.<sup>2</sup> Complainants are not seeking an extension of time to file  
4 interrogatories. The interrogatories were timely filed on April 4, 2014, the deadline in the  
5 Commission’s scheduling order for serving discovery. The ensuing wrangling has made it  
6 necessary to seek acceptance of the additional interrogatories that were timely filed. There is no  
7 time limit on when a request for permission for additional interrogatories is to be made. And  
8 what is the harm to NWE? The deadlines in this case have already been pushed back.

9 ARM § 38.2.3301, allowing for use of the Rules of Civil Procedure here provides:

10 (2) Nothing in (1) of this rule shall be construed to limit the free use of data  
11 requests among the parties. The exchange of information among parties pursuant to data  
12 requests is the primary method of discovery in proceedings before the commission.  
13

14 Complainants designated all of the above mentioned interrogatories as a data requests,  
15 and only some of them as interrogatories.<sup>3</sup> There does not appear to be a limit on the number of  
16 data requests. However, even if there were a limit Rule 33 permits the Commission to allow  
17 more interrogatories.

18 **F) NWE’s irrelevancy objections** to each data request are covered in Complainants’  
19 brief support the motion. NWE’s response in most cases merely restates those objections without  
20 additional enlightening information. Complainants’ reply herein are therefore limited when no  
21 additional explanation is required.

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<sup>2</sup> [38.2.312](#) EXTENSIONS OF TIME

(1) In the discretion of the commissioners or a hearing examiner, for good cause shown, any time limit prescribed by commission ruling or by these rules may be extended. All requests for extensions shall be made before the expiration of the period originally prescribed or as previously extended.

<sup>3</sup> C-075 is not listed in the interrogatory section of the discovery request.

1           **G) NWE persists in objecting to requests for information about events prior to**  
2 **establishment of the ownership charge per se on July 1, 1998.**

3           When NWE refused to provide its lighting tariffs, Complainants sought them from the  
4 Commission records. Commission staff was kind enough to scan and email them. Scan 12C1,  
5 page 1 which contains tariff YL-83, Supplement # 1, effective for service after June 30, 1983, it  
6 says:

7           “The unit charge includes energy, **ownership** and maintenance **cost** for unit, one wood  
8 pole and up to 200 feet of overhead line extension ....” [Emphasis added]  
9

10          This wording is repeated on the next 12 pages of the scan for tariffs as far back as tariff  
11 YL-75 effective March 1, 1977. So, the ownership component of the rate goes back much  
12 further than NWE is letting on.

13           **H) NWE provided an incomplete response to Data Request C-080, RPD 9 which**  
14 **sought:**

15          ...a copy of the 2012 Montana Depreciation Study and a disc with the Plant and  
16 depreciation reserve data that was collected for that study for the accounts associated with street  
17 lights.

18          NWE objected to this request by contending it “seeks information involving matters other  
19 than electric street lighting matters.” NWE’s Response Brief (p. 9 & 10) persists in this clearly  
20 false characterization. As discussed in Complainants’ Brief supporting this motion, the  
21 Commission can see from the above request that Complainants were seeking “the Plant and  
22 depreciation reserve data that was collected for that study **for the accounts associated with**  
23 **street lights.**”

24          In failing to be forthright in its response to this request, NWE provided summary  
25 information concerning the depreciation of street lights without the sub-account. Further it  
26 included the “Vintage Grouping” showing remaining life and depreciation of its Distribution

1 Plant. Since Street Lighting is a small part of the Distribution Plant, it is impossible to tell from  
2 the material provided exactly how the yearly depreciation rate for the Street Lighting  
3 subcategory of Distribution Plant was arrived at.

4 **REMEDY: Complainants have clearly alleged in their petition and proven in their**  
5 **testimony that NWE has created an ownership charge tariff that recovers more than the**  
6 **allowed original cost (plus allowed return) because the depreciation schedule for lights is**  
7 **too long. NWE's deception will be further unmasked if this question is answered candidly.**  
8 **Therefore, Complainant's respectfully ask the Commission to order that the information**  
9 **specifically relating to street lights and their sub-account sought by C-080 be required. And**  
10 **that further NWE be ordered to pay \$5,000 in attorney's fees because Complainants have**  
11 **had to engage in protracted motions to compel discovery uncovering the depth of NWE's**  
12 **evasive deceptive and unlawful practices.**

13 NWE contention that Complainants cite no statutory authority for an award of attorney's  
14 fees is discussed above.

15 L) **NWE refusal to answer Data Request C-089 (RPD 10).** We know that NWE keeps  
16 accounts for tax a Federal Energy Regulatory Commission (FERC) purposes. That is why  
17 Complainants made **Data Request C-089 (RPD 10)** asking NWE:

18 Please provide copies of FERC plant account 373.1, Street Lighting and all sub accounts  
19 for Street Lighting Account for years  
20

21 NWE objected to this request by contending it was vague because it did not specify  
22 which years were requested. Complainants apologize for this lack of specificity and amend the  
23 request to read:

24 Please provide copies of FERC plant account 373.1, Street Lighting and all sub accounts  
25 for Street Lighting Account for years 1984, 1997, 1998 & 2013.  
26

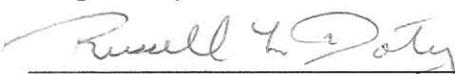
1 NWE now objects because the request asks for data in 1984 and 1997. While  
2 Complainants have been able to obtain some of the requested data from FERC, we still need the  
3 sub account data in order to break out street lighting from other outdoor lighting in that account.  
4 In view of the fact that NorthWestern's 2012 FERC report showed it was earning 26.99 cents per  
5 kWh on public street & highway lighting from its Montana operation but 10.76 cents per kWh  
6 from its South Dakota operation, more data is needed to evaluate the extent of this apparent  
7 overcharge.

8 **CONCLUSION**

9 **All of the requests for Remedies specified in Complainants' Brief supporting motion**  
10 **should be granted.**

11 Respectfully submitted.

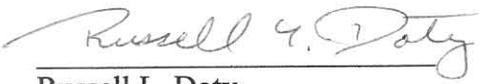
June 12, 2014

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13 \_\_\_\_\_  
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17 Greeley, CO 80634-1256  
18 Phone: 406-696-2842  
19 Email: [iwin4u1@earthlink.net](mailto:iwin4u1@earthlink.net)  
20

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 12, 2014, an accurate copy of **Complainants' Reply to NWE's Response to Complainants' Motion Requiring Northwestern to Respond Adequately to Complainants' Third Set of Discovery or Face Sanctions in Docket No. D2010.2.14** were served upon the parties listed below in the manner provided:

<input checked="" 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 checked="" 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>

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9   
10 Russell L. Doty