

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 AMENDED PRE-FILED WRITTEN DIRECT TESTIMONY OF COMPLAINANTS' WITNESS, TOM TOWE
6 Filed March 27, 2015

7 **Q. Please raise your right hand. Do you solemnly affirm that the written testimony**
8 **below and any written or oral testimony or responses to data requests following such will be**
9 **the truth the whole truth and nothing but the truth?**

10 A. I do.

11 **Attorney: You will be under oath during this entire proceeding.**

12 **[Proof of Complaint ¶¶ 24.]**

13 **Q. Please state your name, business and email addresses, and phone number.**

14 A. I am Thomas E. Towe. I work at 2525 6th Av N., Billings, MT 59101-1390. My email
15 address is towe@tbems.com . My phone number is (406) 248-7337.

16 **Q. PSC Order No. 7084i has required that we strike portions of your testimony. What**
17 **has been done to comply with that order?**

18 A. We are striking attorney comments and references to LED lighting or other matters
19 outside of ownership overcharge considerations by either eliminating them or interlineating them
20 when necessary to preserve them for the remedy phase of the proceeding or for purposes of
21 showing offers of proof. In places where qualifications to testify or relevancy concerns may have

1 been raised if a specific motion to strike had been made, we are adding foundation and relevancy
2 testimony as we would be allowed to do at hearing if a proper motion to strike had been made to
3 specific portions of the testimony. So far, no one has made a motion to strike specific lines of
4 testimony.

5 **Q. In ordering me to strike certain portions of your testimony, the February 24, 2015,**
6 **Commission Staff Action cautioned me to avoid filing changes in your testimony, saying**
7 **“Complainants are not authorized to add material to their written, prefiled testimony,” Do**
8 **you have a response to that?**

9 A. The Commission’s Rule does not require authorization to amend documents at this
10 point. It allows amendment as a matter of right prior to when a hearing date has been set. The
11 hearing date in this case was postponed and has not been re-noticed. So until other parties in
12 the case have filed their testimony and a new date is set, Commission approval to amend does
13 not have to be sought. ARM 38.2.1207 says:

14 38.2.1207 AMENDMENTS

15 (1) **Any pleading or document may be amended prior to notice of the hearing.**

16 After notice of a hearing is issued, motion for leave to amend any pleading or document
17 may be filed with the commission and may be authorized in the discretion of the
18 commission or the hearing examiner.

19
20 Complainants have the burden of proof to show a *prima facie* case in their direct case or
21 face a motion to dismiss. Preventing amendment under these circumstances for no stated
22 reason would be an abuse of discretion. Also, our addressing as much of the discovery
23 responses as is possible now, gives NorthWestern the opportunity to rebut in its initially filed
24 testimony. Thus, we are accompanying this amended testimony with a request (under ARM
25 3.226 through 1.3.229 as adopted by ARM 38.2.101) for the Commission’s declaratory

1 judgment to interpret ARM 38.2.1207 as we have done (i.e., not requiring Commission approval
2 for document amendment at this point or in the alternative to grant our motion by exercising
3 its discretion and approving our amended testimony).

4 **Q. The February 24, 2015, Commission Staff Action states: “Complainants will have the**
5 **opportunity to file rebuttal testimony, in which Complainants will be able to incorporate any**
6 **discovery responses they receive.” Given your 52 years of legal experience, do you agree?**

7 A. No. If I bring up issues on surrebuttal not addressed in NorthWestern’s initial rebuttal
8 testimony, NorthWestern will not have an opportunity to respond and will likely object. So it
9 may not be correct to say that Complainants will have an opportunity to present information
10 regarding answers to the discovery as part of rebuttal. Complainants have a right to build a
11 record on comments made by NorthWestern’s discovery responses which are online as having
12 been filed in the case.

13 Further, since neither NorthWestern nor the Consumer Counsel has filed their
14 testimony, the hearing officer may give them ample opportunity to defend after amendments
15 to Complainants’ testimony are made.

16 **Q. Please tell us about your education and occupations?**

17 A. I grew up as an Iowa farm boy and started high school in Dupree, South Dakota. I
18 graduated from high school at Westtown School, a Quaker boarding school in Westtown,
19 Pennsylvania. I went to college at Earlham College in Richmond, Indiana, and went to The
20 University of Montana Law School where I graduated with an LL.B., with honors in 1962. I
21 received a Master’s in Law from Georgetown University in 1965 and spent two years at the
22 University of Michigan as a graduate student working on an S.J.D. degree, which is the terminal

1 degree in law. I served in the US Army JAGC as a military lawyer and completed my three years
2 of service as a Captain.

3 **Q. When were you admitted to practice law in Montana?**

4 A. 1962. In January 1967, after my military service, I set up my own law firm in Billings,
5 Montana and currently I am a partner in the firm of Towe, Ball, Mackey, Sommerfeld, and
6 Turner. I recently received a pin from the Montana Bar Association signifying that I have been
7 practicing law for 50 years. As a part of my practice, I have represented clients before the Public
8 Service Commission.

9 **Q. Where else are you admitted to practice law?**

10 A. I've been admitted to practice law before the US Supreme Court, the 1st, 2nd, 9th, 10th
11 and DC Circuits of the United States Circuit Courts of Appeal, U.S. Court of Military Appeals, US
12 Claims Court, Montana Federal District Court, and the Northern Cheyenne, Crow, Fort Belknap,
13 and Fort Peck Tribal Courts.

14 **Q. Have you taught law anywhere?**

15 A. Yes, I taught American Jurisprudence in Ufa, Russia as part of a program sponsored by
16 the Center for International Legal Studies. I've also presented at several continuing legal
17 education seminars.

18 **Q. Are you currently serving on any government entities related to natural resources
19 or energy?**

20 A. I was appointed by Governor Bullock to serve as Chair of the newly created Montana
21 State Parks & Recreation Board, and as a member of the Montana Coal Board. I authored the

1 Montana coal tax when I was a legislator and sponsored the legislation that created the Coal
2 Board. I recently withdrew my name for confirmation to the Coal Board.

3 **Q. So you served in the Montana Legislature?**

4 A. Yes for a total of 20 years, in the Montana House of Representatives for 4 years and
5 16 years in the Montana Senate.

6 MONTANA'S ORIGINAL COST RATE BASE LAW EXPLAINED BY ITS AUTHOR

7 **Q. As part of your tenure as a Montana State Senator, did you sponsor legislation**
8 **relating to electric utilities?**

9 A. Yes. I introduced a number of bills dealing with utilities and utility regulation.

10 **Q. Please explain.**

11 A. In the first four sessions, I introduced at least 11 bills dealing with utilities.
12 Undoubtedly, the most important of these were two that passed in the 1975 session. The first
13 one eliminated institutional advertising as a legitimate deductible expense for rate purposes.
14 The second, SB 150, eliminated the so-called "Fair Value" system of ratemaking.

15 **Q. Did SB 150 have bi-partisan sponsorship and support?**

16 A. Yes. Senator Bob Brown, a Republican, was one of four co-sponsors; the other co-
17 sponsors held Democratic leadership positions. SB 150 passed on third reading in the Senate by
18 a bipartisan vote of 32 to 17, and in the House by a bipartisan vote of 58 to 38. It is now part of
19 MCA § 69-3-109.

20 **Q. Did anyone who is now in a position of leadership at NorthWestern vote for SB 150**
21 **while they were in the legislature?**

1 A. Yes, Dorothy Bradley, who is now a member of NorthWestern’s Board of Directors,
2 voted for SB 150 when she was a member of the Montana House of Representatives.

3 **Q. What does MCA § 69-3-109 currently provide?**

4 A. It says:

5 **69-3-109. Ascertaining property values.** The commission may, in its discretion,
6 investigate and ascertain the value of the property of each public utility actually
7 used and useful for the convenience of the public. **The commission is not bound**
8 **to accept or use any particular value in determining rates. However, if any**
9 **value is used, the value may not exceed the original cost of the property,**
10 except that the commission may include all or some of an acquisition adjustment
11 for certain property purchased by a public utility in the purchasing utility's rate
12 base if the transfer of the property to the purchasing utility is in the public
13 interest. In making the investigation, the commission may avail itself of all
14 information contained in the assessment rolls of various counties or in the public
15 records of the various branches of the state government or of any other
16 information obtainable, and the commission may at any time on its own
17 initiative make a revaluation of the property.

18 **History:** En. Sec. 6, Ch. 52, L. 1913; re-en. Sec. 3884, R.C.M. 1921; re-en. Sec.
19 3884, R.C.M. 1935; amd. Sec. 1, Ch. 28, L. 1975; R.C.M. 1947, 70-106; amd. Sec.
20 1, Ch. 373, L. 1995. [Emphasis added]

21
22 **Q. Did NorthWestern admit that you have correctly quoted the bolded sentences of §**
23 **69-3-109?**

24 A. Yes, that was in response to C-005, RFA 5. However, without identifying a witness to
25 testify concerning its response, NorthWestern continued responding to RFA 5 saying it “denies
26 that § 69-3-109, MCA, is related to the facts and claims in this case.”

27 **Q. Throughout your amended testimony, you address NorthWestern’s responses to**
28 **discovery. Why did you not address those responses in you initial testimony?**

29 A. NorthWestern’s discovery was not due until March 20, 2014, the day before my
30 testimony was due. Much discovery was not due until after my testimony was due. So, there

1 simply was not enough time to address that discovery in my March 21, 2014, testimony.
2 Therefore, NorthWestern’s responses are being addressed in this amended testimony.

3 **Q. Is MCA § 69-3-109 “related to the facts and claims in” pleadings in this case?**

4 A. Yes. The pleadings reference the requirement of MCA § 69-3-109.

5 **Q. Where in the pleadings is that reference?**

6 A. Amended Complaint, p. 9.” On page 10, ¶ 24 of the Amended Complaint alleges in
7 support of the Count 1 claim:

8 24. Montana law requires NorthWestern to use the original cost depreciated
9 method of calculating the value of utility property placed into its utility rate base.

10
11 NorthWestern responded to that complaint paragraph by saying the law speaks for
12 itself.

13 **Q. Neither paragraph 24 of the complaint nor NorthWestern’s response specifically**
14 **mention MCA § 69-3-109. So how is it that you say, “The pleadings reference the requirement**
15 **of MCA § 69-3-109.”**

16 A. In admitting the law (referenced generally in paragraph 24) speaks for itself,
17 NorthWestern must be speaking about MCA § 69-3-109. That is, MCA § 69-3-109 is the only
18 statute that requires utilities to use not more than original cost when placing the value of utility
19 property, like street lights, into their rate base. Therefore, MCA § 69-3-109 must be the law
20 which NorthWestern says speaks for itself.

21 Also, in Order No. 7084f, ¶ 8, the Commission accepted for review Complainant’s Count
22 1 “allegation that the ownership charge of NWE’s street lighting tariff is unreasonable or
23 unjustly discriminatory. Paragraph 24 is an allegation made in support of the Count 1 allegation
24 accepted for review. So, since Paragraph 24 referenced the only statute requiring valuation not

1 to exceed original cost, that law (i.e., MCA § 69-3-109) is related to the pleadings in this case
2 and therefore relevant to matters being considered as part of it.

3 **Q. As you have discussed, NorthWestern’s answer to complaint paragraph 24**
4 **contends, “the law speaks for itself.” Yet NorthWestern deemed it necessary to add to the**
5 **interpretation of MCA § 69-3-109 by denying that it relates to” the facts and claims in this**
6 **case.” Is there anything in MCA § 69-3-109 that limits its scope as claimed by NorthWestern?**

7 A. No.

8 **Q. There has been an unspecified objection to your first pre-filed testimony that you**
9 **cannot testify as an expert on public utility matters. What do you say concerning that claim?**

10 A. The foundation for my testimony is that I know from first-hand knowledge what I
11 intended to accomplish by authoring SB 150. I also know from my own research into Montana
12 history about the background of utility abuse that brought about my sponsorship of the law.
13 Therefore, I know perhaps more than anybody about the legislative intent of the law I authored
14 and the reasons why I authored it. That should qualify me to testify about those reasons and
15 the legislative intent that brought about the 1975, SB 150 amendments to MCA § 69-3-109.

16 One early example of an important Supreme Court case which relied on legislative
17 intent was *W.O. Johnson v. Southern Pacific Co.* (1904) 196 U.S. 1. It said at page 18, that the
18 penal statute involved should “not to be construed so strictly as to defeat the obvious intention
19 of the legislature.” There the court decided that a man may sue the railroad for failing to have
20 an automatic coupler since the legislature was attempting to remedy the problem of multiple
21 injuries by railroad coupling. This case is similar in that we were attempting to remedy abuses in
22 utility ratemaking.

1 **Q. Order 7084i makes reference to NorthWestern’s objection to your reference to**
2 **history but does not specifically indicate such reference be deleted from your testimony.**
3 **What reasons do you give for retaining the historical context that you give to passage of SB**
4 **150?**

5 A. I will testify later about MCA § 28-2-701 which clearly states an act is unlawful if it is
6 “(2) contrary to the policy of express law, though not expressly prohibited.” In order to give
7 background for that testimony, I will testify about the policy of SB 150 as it now appears in MCA
8 § 69 -3-901.

9 *Heydon’s Case*, Exchequer, 1584, 3 Co. 7a, 76 E.R. 637, lays down a special rule for the
10 interpretation of statutes and insists that one cannot interpret a statute properly until one
11 knows the social policy it was passed to effect. Once you discover why the Act was passed, then
12 with that knowledge in mind you can give the words under interpretation the meaning which
13 best accomplishes the social purposes of the Act.

14 The history behind legislation on the matter being considered and conditions at the time
15 a statute was enacted have often been considered when aids to statutory interpretation are
16 needed. For example, see *Kelly v. Dewey*, Supreme Court of Errors of Connecticut, 111 Conn.
17 280, 149 A. 840, 842 & 844 (1930).

18 And in *U.S. v. Howell Electric Motors, Co.*, 78 F. Supp. 627, 630-1 (Dist. Ct. E.D. Michigan,
19 1948), the Court deemed affidavits of a senator and legislative staff attorney “as competent
20 corroboratory testimony” to demonstrate the intent of Congress even though the court
21 thought the statutory meaning was clear, saying: “But if it can be construed that interpretation
22 is not clearly apparent by a fair reading of the language used, then any information or evidence

1 bearing upon the intent of Congress, may be produced.” [Citing *U.S. v. Dickerson*, 310 U.S. 554,
2 60 S.Ct. 1034, 1038, 84 L.Ed 1356 (1940).] In *United States v. American Trucking Associations*,
3 Inc., 310 U.S. 534, 543-4, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940), the court said: ‘When aid to
4 construction of the meaning of words, as used in the statute, is available, there certainly can be
5 no ‘rule of law’ which forbids its use, however clear the words may appear....”

6 Therefore, since NorthWestern simultaneously contends the law (MCA § 69-3-109)
7 speaks for itself and says that it does not apply here, my testimony (in affidavit form) ought to
8 be of record to clarify the statutory intent as to why MCA § 69-3-109 is relevant here.

9 **Q. What is the "mischief and defect" that the 1975, SB 150 amendment to MCA § 69-3-109**
10 **set out to remedy? That is, what was the reason you proposed the law and the policy you and**
11 **the others who enacted it wanted to establish?**

12 A. I was convinced that the principle utility company in Montana at that time, the
13 Montana Power Company, was taking advantage of its customers by use of the so-called “fair
14 value” method of determining the value the assets it placed in the rate base. We wanted to
15 establish policy preventing various methods of inflating rate bases because despite the name,
16 they allowed Montana utilities to charge more than was “fair” for utility service.

17 **Q. Explain what you told the legislature about how the term “fair value” was used at**
18 **the time in utility ratemaking and about how “fair value” was determined.**

19 A. It was and is my understanding that the method used at that time to determine the
20 value of the assets to put in a utility’s rate base for ratemaking purposes was not based on any
21 real numbers or calculations. It was based on the so-called “fair value” method.

1 As I explained it to the legislature, someone from the company would go out and look at
2 a dam, for example, and say “I think that dam is worth x number of dollars.” That is how the fair
3 value of the property was determined to put in the rate base. “Fair value” could mean the
4 property could be valued in a number of ways. However, in Montana and many other states it
5 was a misnomer. Here “fair value” generally meant that utility property was valued using an
6 estimate of reproduction cost new; this was not fair to consumers.

7 **Q. How did that work to the detriment of consumers?**

8 A. Well, for example, Montana’s dams, which may have cost one amount to build in the
9 early part of the 1900s, were valued at whatever it would cost to build the dams in the 1960s.
10 Since because of inflation, the amount to build dams in the 1960s would greatly exceed the
11 original cost of the dams, it would mean Montana consumers would not be paying for what it
12 cost to build the dams, but for a hypothetical cost – an absolutely arbitrary number - that the
13 company or stockholders never incurred to build the dams. Utilities are regulated so that their
14 investors get the capital they invest in infrastructure back plus an allowed reasonable rate of
15 return. The utility also gets its operating expenses. If regulation is competent, they should get
16 no more. The legislature agreed with me that this was wrong for the utility to get back more
17 than it had invested plus a reasonable return, so my bill did away with the practice of
18 overvaluing utility property.

19 I raised the question of why the utility companies should not be required to use the
20 same value for rate purposes that they used for tax purposes. In fact, when a number of utility
21 officials of the Montana Power Company were in Billings one day, the public was invited to ask
22 questions. I asked if it was true that the Montana Power keeps two sets of books, one to pay

1 taxes by and the other to charge rate payers. I don't remember now whether it was the CEO or
2 some other high official of the company who answered but he answered that it was true. Not
3 only did they use one set of books to pay taxes, and another set of books to charge rates, but
4 they kept a third set of books to show their stockholders. The Billings Gazette carried this story
5 with big headlines on the front page of their newspaper the next day.

6 I thought this was wrong. So I introduced a bill that required utility companies to pay
7 taxes and charge rates on the same set of books, i.e., use the same value for the assets in their
8 rate base as they used to compute their income taxes. This means the value was to be set at
9 the original cost depreciated. As you can see, it got amended some in the process through the
10 legislature. In fact, it did not pass the first time. I introduced HB 121 in the 1973 session. It
11 passed the House but was killed in the Senate. I introduced a bill to put it on a referendum in
12 the 1974 session but that also failed. I introduced it again as SB 150 in the 1975 session when I
13 was elected to the Senate. While I would have preferred the original version which would have
14 ~~been~~ adopted a strict original cost less depreciation as used for income tax purposes, I was
15 satisfied with the final language. The final language, as you can see, allows the use of a value
16 that could never exceed original cost but would not exactly match the value they used for
17 depreciating that asset for tax purposes. The PSC is allowed to compare the final value with the
18 value used for property tax purposes.

19 **Q. You said the final language allows the utility to depreciate its property differently**
20 **for ratemaking purposes than for tax purposes. Please explain what you understood about**
21 **how that works when proposing SB 150.**

1 A. for example, the government may allow utility property to be depreciated rapidly for
2 tax purposes. When all that depreciation is taken, no more depreciation is allowed for tax
3 purposes. Taxes are an operating expense that consumers reimburse the utility for. So, when
4 utilities take depreciation sooner rather than later, it creates a larger reduction in taxes, and
5 hence a smaller tax operating expense for utility consumers to pay in the near term. It shifts
6 deductions for taxes from the future to a more recent time. Therefore, it conversely shifts
7 consumer payments to cover the tax operating expense from the near-term to the future.

8 The depreciation rate in ratemaking has a similar effect. If for example, the rate base is
9 depreciated over a 10-year time period, the consumers pay more each year (but less in overall
10 costs in the long run) to reimburse the utility and its bond and stock holders for their
11 investment and the rate of return on that investment than they would pay each year if the rate
12 base (i.e., utility property) were depreciated over 30 or more years. As in the case with tax
13 depreciation, once the property is fully depreciated (often called amortized in FERC Form 1
14 reporting) and the utility has recovered the original cost of the investment plus a rate of return
15 for its financiers, the depreciated (amortized) asset drops out of the rate base and the value of
16 the asset that was financed by the utility financiers is zero for ratemaking purposes. A rapid
17 write off as is allowed by the Internal Revenue Code may be too harsh on utilities who rely on a
18 rate base. I argued that if it was too harsh, they should change their tax write off situation so
19 they could be the same. But when there was legislative pressure to let the utilities take
20 advantage of the tax code while at the same time using a reasonable write off for rate base
21 purposes, I agreed and accepted the change in SB 150.

1 What we did with SB 150 as it was finally adopted was require the utility to start with
2 the same original cost basis for tax and rate base purposes, but allow for the utility commission
3 and legislature to set the rate of depreciation. However, nothing in SB 150 or MSA § 69-3-109
4 allows the rate of depreciation to be set to circumvent the purpose of the statute, which is to
5 prevent utilities from recovering more than it cost to put street lights or other assets into
6 service.

7 **Q. Do you know what other states allowed in this regard?**

8 A. No, I don't. I believe, however, my bill was consistent with earlier reforms that had
9 taken place in other states, reforms that had still not reached Montana.

10 **Q. You say SB 150 was to establish a policy preventing unjust rate base inflation,
11 please give us a brief background of what you told the 1975 legislature about early utility
12 abuses which the Montana legislature in turn addressed by enacting reforms which are the
13 basis for bringing the claim here that current street lighting rate bases and tariffs are
14 unreasonable?**

15 A. Almost everyone in Montana is familiar with the history of copper mining in Butte
16 and the War of the Copper Kings. It may be less well known but it certainly is well documented,
17 that when the predecessor of NorthWestern Energy (the Montana Power Company) was
18 formed its stock was watered by a series of fictitious write-ups. As I testified in legislative
19 hearings, The Montana Power Company was created to provide power for the mines in Butte.
20 But they did not create it from scratch; the officers of the Anaconda Company personally
21 acquired the Missoula power company and several other small power companies and turned
22 around and sold them the next day to the Montana Power Company, which these same officers

1 organized for this purpose, for at least double what they paid for these companies. Then they
2 put this inflated value into the rate base. This meant the company was overvalued from the
3 beginning. This all came to light after Montana's U.S. Senator Tomas J. Walsh was able to
4 secure passage of a 1927 resolution authorizing the Federal Trade Commission (FTC) to
5 investigate the electric power trust.

6 Between 1928 and 1932, the FTC uncovered more than one and one-half billion dollars
7 of watered electric company stock. Montana Power circumvented those investigations by
8 refusing to allow the FTC to look at its books.

9 **Q. Did Congress do something to curb the type of evasions engaged in by Montana**
10 **Power that are similar to evasions by NorthWestern that are alleged in this case?**

11 A. Congress passed the Federal Power Act of 1935. By 1944 the Federal Power
12 Commission (FPC) had discovered \$500,000,000 in inflated values in U.S. utilities. Most of that
13 was dropped from the respective rate bases without opposition from the utilities involved and
14 even without a hearing. That Act marked the beginning of regulatory efforts to curb various
15 utility attempts like the one involved in street lighting valuation here to inflate their rate bases
16 or otherwise overstate revenue requirements.

17 **Q. Did the excess drop out of the rate base in Montana?**

18 A. Not then. Montana Power opposed the write-down. So, in 1944, the rate base
19 allowed by the Montana Public Service Commission was \$21.6 million more than the rate base
20 calculated by the FPC. I wanted to eliminate that discrepancy between Montana Power rate
21 base as calculated by state and federal regulators. So that discrepancy was one factor leading to
22 my introduction of SB 150, which is in the current version of MCA § 69-3-109.

1 **Q. Were there other factors motivating you to introduce your bill?**

2 A. We wanted to eliminate so-called “fair value rate bases” and reproduction cost new
3 and reproduction cost depreciated methods of valuing utility property. In the early days of
4 utility regulation, several states with weak regulatory systems used what was known a “fair
5 value” rate base. It was yet another trick to inflate the value of utility property that was not
6 unlike the trick allegedly used to inflate the value of street lighting in NorthWestern’s rate base
7 in this case.

8 NORTHWESTERN’S CONTRIVED, CORRUPTED STREET LIGHTING RATE BASE

9 **Q. Why do you say the mischief that SB 150 was intended to stop is like the trick used**
10 **to inflate the value of street lights in this case?**

11 A. As I understand this case, the street lighting rate base may have started out as an
12 original cost rate base. We don’t know for sure because so far NorthWestern has been unable
13 or unwilling to provide the original cost of street lighting in many lighting districts. So it is not
14 able to demonstrate that the value it uses for those lights was equal to or less than original
15 cost.

16 However, even if the rate base did start out based on original cost, Complainant
17 witnesses have testified that the value in their SILMDs and elsewhere became corrupted over
18 time. That is, the value remaining in the rate base has been allowed to stay there longer than
19 permissible because the tariff has collected revenues each year in excess of what would be
20 needed to cover depreciation, rate of return and operating expenses for that year. The result is
21 that the utility gets more than necessary to reimburse NorthWestern and its financiers for what
22 they originally invested plus the allowed rate of return (and operating expenses).

1 **Q. You said “so far NorthWestern has been unable or unwilling to provide the original**
2 **cost of street lighting in many lighting districts.” Please explain where that has happened.**

3 A. On January 27, 2014, data Request C-041, Interrogatory I 14 sought original cost
4 figures for Billings SILMDs where NorthWestern owns street lights as well as the date
5 NorthWestern first billed for those lights. That same information was re-requested on April 4,
6 2014, per C-081.

7 On May 2, 2014, NorthWestern updated its response to C-041, Interrogatory I 14 and C-
8 081.

9 **Q. I’m showing you what has been marked Complainants’ Exhibit 23. Do you recognize**
10 **this exhibit?**

11 A. It is NorthWestern’s updated (May 2, 2014) response to Data Request C-041 (& C-
12 081). The Commission may also take administrative notice of it from its electronic filing system.

13 **Q. What does this updated response prove?**

14 A. It demonstrates that NorthWestern does not know the original cost of street lights in
15 99 Billings SILMDs (including the three lighting districts where Grubas and Barsantis pay for
16 NorthWestern-owned street lights). NorthWestern knew the original cost in only three SILMDs
17 and could estimate the cost in five SILMDs.

18 **Q. Did Complainants attempt to determine whether original cost data was available in**
19 **some database or file other than NorthWestern’s fixed accounting system?**

20 A. Yes. On April 4, 2014, Complainants’ submitted Data Request C-082 (a follow-up to C-
21 041) seeking the same original cost information “that is available in an electronic or non-
22 electronic system other than the fixed accounting system.” NorthWestern declined to respond

1 contending Complainants had exceeded the allowable number of interrogatories. The hearing
2 examiner denied Complainants' motion to compel or to allow additional interrogatories.

3 **Q. What else did Complainants seek to know about NorthWestern's fixed accounting**
4 **system?**

5 A. The names of fields in that system, so they could determine which fields to seek
6 information from. However, claiming the request was irrelevant and overly broad,
7 NorthWestern declined to list the fields in its fixed accounting system in response to Data
8 Request C--83. Knowing relevant field names would demonstrate whether or not and how the
9 original cost data is gathered and stored and whether it is retrievable.

10 **Q. What effect did your bill, SB 150, have on utility ratepayers?**

11 A. It meant that utilities could not jack-up the value of the rate base by using some
12 artifice to recover more than the original cost of property that was used and useful to serve the
13 public.

14 **Q. You said "utilities could not jack-up the value of the rate base by using some**
15 **artifice to recover more than the original cost of property that was used and useful to serve**
16 **the public." What did you mean by the term "some artifice?"**

17 A. An artifice would be a trick, ploy, sleight of hand, deception, or ruse to avoid the clear
18 meaning of § 69-3-109. In this case, it would be putting the cost of street lights or other utility
19 property in the rate base, but not depreciating it according to what had been collected in
20 revenue to cover only the original cost of the street lights (plus allowed rate of return and
21 operating expenses including maintenance). The law clearly says "the value may not exceed the
22 original cost of the property!" Since utilities are only allowed to recover the original cost value

1 of the property, any artifice that allows recovery in excess of the original cost clearly violates
2 the law I authored.

3 **Q. In your opinion as an attorney having practiced law in Montana for more than 52**
4 **years, if an artifice is employed to circumvent the law, may the Commission approve of that**
5 **procedure?**

6 A. Of course not. Any such approval, whether it be a knowing or inadvertent approval is
7 void *ab initio*, that is, void from the start because the Commission has no authority to approve a
8 procedure or artifice to circumvent the law.

9 **Q. Is there a section of Montana law on which you base your statement that the**
10 **Commission has and had no authority to approve a procedure or artifice to circumvent the**
11 **law?**

12 A. Yes, MCA § 28-2-701. That law plainly states that an act is not lawful if it is:

13 (1) contrary to an express provision of law;

14 (2) contrary to the policy of express law, though not expressly prohibited; or

15 (3) otherwise contrary to good morals.

16 **Q. You mentioned the term void ab initio. What is your understanding of that term?**

17 A. The concept is described in *Singh v. Mooney*, 261 Va. 48, 541 S.E.2d 549 at 551 (Va.,
18 2001) where the Court said:

19 An order is void ab initio if entered by a court in the absence of jurisdiction of
20 the subject matter or over the parties, if the character of the order is such that the court
21 had no power to render it, or if the mode of procedure used by the court was one that
22 the court could "not lawfully adopt." *Evans v. Smyth-Wythe Airport Comm'n*, 255 Va.
23 69, 73, 495 S.E.2d 825, 828 (1998) (quoting *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E.
24 176, 177 (1887)).
25

1 Also see, *Barnes v. Am. Fertilizer Co.*, 144 Va. 692, 705, 130 S.E. 902, 905 (1925), for a
2 ruling that:

3 To the extent, therefore, that the court exceeded its authority, or its jurisdiction,
4 over the subject matter embraced in the decrees, they are absolute nullities, and may
5 be impeached directly or collaterally by all persons, anywhere, at any time, or in any
6 manner; and may be declared void by every court in which they are called in question.
7 [Citations omitted.]

8
9 In this case, the Commission exceeded its authority when it approved a street lighting
10 tariff that allowed NorthWestern to collect revenues that would recover more than the original
11 cost of the lights allowed by MCA § 69-3-901 (plus other allowed items).

12 OWNERSHIP CHARGE APPLIES ONLY TO UTILITY-OWNED LIGHTS

13
14 **Q. Mr. Towe, I am showing you what has been marked Complainants' Exhibit 24. Do
15 you recognize this document?**

16 A. Yes it is a copy of NorthWestern's ELDS-1 tariff. It is also found online at
17 [http://www.northwesternenergy.com/docs/default-](http://www.northwesternenergy.com/docs/default-source/documents/MT_Rates/Electric/ELDS-1.pdf)
18 [source/documents/MT_Rates/Electric/ELDS-1.pdf](http://www.northwesternenergy.com/docs/default-source/documents/MT_Rates/Electric/ELDS-1.pdf). In a separate document, we have moved the
19 Commission to take administrative notice of the official record of NorthWestern's ELDS-1 tariff.
20 The March 13, 2015, Staff Action postponed ruling on that motion saying, it "can be ... ruled on
21 by the Commission during the hearing."

22 **Q. What does the tariff apply to?**

23 A. Electric Lighting Delivery Service (ELDS) says its applicability is for street, highway,
24 alley, and post top and other lighting that is generally on from dusk to dawn.

25 **Q. Does it provide for an ownership charge?**

1 A. Yes, on the 22nd Revised Sheet 40.1, 32nd Revised Sheet 40.2, and 40.2, and 1st
2 Revised Sheet 40.3.

3 **Q. What is the tariff dated?**

4 A. There are various dates. Sheets 40.1 and 40.2 are dated February 13, 2013, Sheet
5 40.3 is dated January 1, 2011.

6 **Q. Does Exhibit 24 indicate whether the ownership charge applies to utility-owned
7 lights and customer-owned lights?**

8 A. Revised sheet No. 40.3, paragraphs 1(A & B) of the Exhibit 24 tariff apply the
9 ownership charge only to utility owned lights. It does not apply the ownership charge to
10 customer-owned lights.

11 **Q. Are there other charges in the ELDS-1 tariff that apply only to utility-owned lights
12 and not to customer-owned lights?**

13 A. In many cases the maintenance and operation charges only apply to utility-owned
14 lights and not to customer owned lights unless the customer has contracted for the operations
15 or maintenance service.

16 **Q. Are there other charges in the ELDS-1 tariff that apply to both utility-owned and
17 customer-owned lights?**

18 A. Yes. The energy supply charge, transmission charge, distribution (delivery service)
19 charge, CTC-QF charge and USBC charge apply to both.

20 **Q. Do you draw any conclusions from the fact that NorthWestern's ownership charge
21 only applies to utility-owned lights?**

22 A. Yes.

1 **Q. What are your conclusions?**

2 A. Customer owner lights are not assessed for the cost of the lights because customers
3 finance them. Since the only components of the street lighting tariff not assessed to customer-
4 owned street lights are the ownership charge, the maintenance charge, and operations charge,
5 it seems probable that the ownership charge is to cover the cost of the street light
6 infrastructure plus an allowed rate of return on that investment. That is, if those are the only
7 major charges not levied on both customer and utility owned lights, and the ownership,
8 operations, and maintenance charges are stated separately, then the ownership charge is more
9 likely than not to cover the cost of initially providing those utility owned lights. Thus, the
10 ownership charge would reflect what is paid to depreciate the original cost of what should be in
11 the rate base.

12 **Q. You conclude the ownership charge would reflect what is paid to depreciate the**
13 **original cost of what should be in the rate base. Is there something else that NorthWestern**
14 **does which leads you to that conclusion?**

15 A. Yes. In its answer to C-033, Interrogatory I 6, NorthWestern explained "... in detail
16 how NorthWestern determines which Ownership Charge 'Cost Range' on Schedule No. ELDS-I
17 that the street lights in a SILMD should be assessed to" indicating:

18 For NorthWestern Energy-owned street lights, the total estimated installed cost
19 including material, labor, contract, and overhead is divided by the total number of
20 lighting units to determine the average cost per lighting unit. By definition in Tariff ELDS-
21 I (Tariff), a lighting unit is a single structure and the luminaries connected to that
22 structure. The average cost per lighting unit is applied to the Cost Range matrix under
23 the Ownership Charge in the Rates section of the Tariff. The Ownership Charge is the
24 Unit Rate associated with the Cost Range in which the average cost per lighting unit fits.
25 For example, under the current Tariff, if the average cost per lighting unit is \$1,125, the
26 Unit Rate is \$14.44 per unit per month.
27

1 Also, in C-015, RFA 15, NorthWestern was asked to “admit that when NorthWestern
2 assigns an Ownership Charge to a bill for a SILMD, it determines the average installed cost of
3 the lighting units per project and matches it with a rate level in the Ownership Cost Ranges set
4 forth under the Rates section of its ELDS-I tariff.” NorthWestern’s response was:
5 “NorthWestern admits that when determining the charges referred as "ownership charges" it
6 complies with the rates section of its Commission-approved ELDS-I tariff.”

7 And in responding to C-055, RFA 34 concerning Billings SILMD 228, where Mr. Barsanti
8 lives:

9 NorthWestern admits that the total bill dated May 29, 2009 for service from
10 April 20, 2009 through May 20, 2009 was \$688.81. The bill includes charges for each of
11 the following Commission-approved tariff items: Transmission Delivery, USBC,
12 Distribution Delivery, Res. CTC-QF, LS Ownership Charge, LS Operations Charge, LS
13 Maintenance Charge, and Supply Charge. NorthWestern admits that this total bill
14 divided by 29 lights results in an average of \$23 .75 per unit.
15

16 **Q. Do you draw any conclusions regarding the ownership charge from NorthWestern’s**
17 **responses to C-033, Interrogatory I 6 and C-015, RFA 15?**

18 A. Yes.

19 **Q. What are your conclusions?**

20 A. In C-015, RFA 15 NorthWestern has admitted how it determines the average cost of
21 lights in a lighting district. So it follows that the total cost of lights in a district would equal the
22 average cost times the number of lights in a district. See NorthWestern’s response to C-055,
23 RFA 34. The total cost of lights in a district would equal the original cost of the lights. That total
24 cost of lights in a SILMD would be the same original cost referenced in my SB 150, which when
25 it became part of MCA § 69-3-109, is the amount that cannot be exceeded when street lights or
26 other utility plant is rate based.

1 I also conclude that this same methodology is used whenever NorthWestern assigns an
2 ownership charge to bills for lights in a SILMD.

3 **Q. In the case of NorthWestern’s street lighting tariff and depreciation schedules, how**
4 **do they circumvent the law you authored?**

5 A. If the ownership charge levied in a street lighting and improvement district goes on
6 for more than the time it takes to recover the original cost of the lights plus an allowed rate of
7 return, it appears more like “contrived profiteering” than a rate of return on the allowed value
8 of the asset. This contrivance suggests an –arbitrarily inflated value of the asset is used for the
9 application of the rate of return, rather than the value that should have been depreciated in
10 conformance with the revenue collected to pay off the original cost. Thus, the law has been
11 unlawfully circumvented. That is exactly what I tried to prevent in SB 150. That is exactly what
12 has happened and is happening in street lighting districts where NorthWestern owns the street
13 lighting poles and light fixtures around Montana. Once whatever portion of NorthWestern’s
14 ownership charge that is allocated to pay for the original cost of street lights completely covers
15 the original cost of the lights in a Street Lighting & Maintenance Improvement District (SILMD)
16 plus the allowed rate of return, that portion of the ownership charge should be eliminated in
17 order to comply with § 69-3-109.

18 **Q. Is there a way in which NorthWestern could have complied with § 69-3-109 by**
19 **administering the depreciation schedule differently?**

20 A. Yes. The proper method under the present tariff would be to follow the law by
21 seeking a rate of return on an asset used to produce the street light that is valued properly
22 under § 69-3-109. I suggest the company simply receive a rate of return on the original cost

1 depreciated until the original cost is fully depreciated in any given SILMD and thereafter there
2 should be no ownership charge for taxpayers in that SILMD. In other words, reduce the
3 number of years the ownership charge is levied to the number of years it takes to depreciate
4 the street lighting in a SILMD so the ownership charge does not remain in the rate longer than
5 necessary to recover the original cost of the lights (plus allowed rate of return), and so the
6 contrived inflated value does not remain in the rate base once the tariffed ownership rate has
7 covered the amount needed to amortize (i.e., depreciate) the original cost plus allowed rate of
8 return.

9 **Q. Is there a way in which NorthWestern could have complied with § 69-3-109 by**
10 **seeking a tariff that did not allow it to over-collect?**

11 A. Yes. NorthWestern could have proposed a tariff that generates revenue that pays off
12 the original cost in the time specified in a depreciation schedule.-Depending on how the tariff is
13 structured, that could lower the annual cost to ratepayers because once the lights are paid for
14 they should be eliminated from the rate base. Instead NorthWestern has perpetrated a ruse by
15 proposing a tariff that allows it to recoup the cost of the lights very quickly and then continue
16 charging as if they had not been fully depreciated. This contrived overvaluation is exactly what
17 SB 150 was intended to prevent.

18 **Q. Paragraph 24 of the Complaint pled “Montana law requires NorthWestern to use**
19 **the original cost depreciated method of calculating the value of utility property placed into its**
20 **utility rate base.” Do you agree with that statement?**

21 A. Yes.

1 **Q. As has been established, NorthWestern’s answer to Complaint Paragraph 24 was**
2 **that “...that the law speaks for itself.” Did you intend for § 69-3-109 to speak for itself when**
3 **setting limits on the valuation of utility property?**

4 A. Yes. The meaning of parts of § 69-3-109 should be very plain; it limits the valuation of
5 utility property so that the valuation and the recovery of that value cannot exceed original cost.
6 While the meaning is clear, since NorthWestern sought to limit its application in this case, it
7 was necessary for me to give the legislative background and intent here.

8 **Q. When you authored SB 150, did you intend for the utility to be able to use**
9 **depreciation schedules or carrying charges in a way that would allow it to recover more than**
10 **the original cost of utility plant plus a reasonable rate of return and operating expenses?**

11 A. No. To allow the utility to jack up its rate base over time by not properly depreciating
12 it would have defeated the purpose of SB 150. **Likewise applying a “carrying charge” in excess**
13 **of the allowed rate of return would be a similar artifice. It would shift revenue meant to**
14 **depreciate the rate base to cover artificial expense like the rate of inflation component of the**
15 **carrying charge. SB 150 did away with all methods of inflating the rate base by applying**
16 **inflationary valuation techniques no matter how cleverly that is contrived.**

17 **Q. Has MCA § 69-3-109 been interpreted by the Montana Supreme Court?**

18 A. Yes, way back in 1979. The name of that case was *In Petition of Montana Power Co.*
19 *for Increased Rates and Charges in Gas and Elec. Services*, 180 Mont. 385, 394 (Mont. 1979),
20 590 P.2d 1140, 1145. In that case, the Montana Supreme Court upheld the elimination of \$5.7
21 million from Montana Power’s previously approved rate base when opining: “This statute is

1 dispositive of this issue. Under it, the Commission is obligated to eliminate from rate base all
2 utility costs in excess of original cost.”

3 **Q. Has NorthWestern admitted that you have correctly quoted the Montana Supreme**
4 **Court’s ruling in *In Petition of Montana Power Co. for Increased Rates and Charges in Gas and***
5 ***Elec. Services?***

6 A. Yes. That was in response to C-006, RFA 6. However, without naming a witness to
7 sponsor the statement other than its attorney, NorthWestern’s response to that Request for
8 Admissions also denies that the Court’s statement is relevant to facts or claims in this case
9 “because the legislature amended the statute [MCA § 69-3-109] in 1995 subsequent to the
10 Court’s decision.”

11 **Q. I am showing you a copy of what has been marked as Exhibit 22. Do you recognize**
12 **this exhibit?**

13 A. Yes. Exhibit 22 is a copy of the 1995 Amendment to MSA § 69-3-109. It is found in
14 Sec. 1, Ch. 373, of the 1995 Session Laws. This copy was scanned from the Session Laws and
15 emailed to us by the Montana State Law Librarian so that the Commission may take
16 administrative notice of it.

17 **Q. What does the Exhibit 22 say with regard to how MSA § 69-3-109 was amended?**

18 A. It says:

Section 1. Section 69-3-109, MCA, is amended to read:

“69-3-109. Ascertaining property values. The commission may, in its discretion, investigate and ascertain the value of the property of every *each* public utility actually used and useful for the convenience of the public. The commission is not bound to accept or use any particular value in determining rates; ~~provided, that~~ *However*, if any value is used, ~~such the~~ value may not exceed the original cost of the property, *except that the commission may include all or some of an acquisition adjustment for certain property purchased by a public utility in the purchasing utility's rate base if the transfer of the property to the purchasing utility is in the public interest.* In making ~~such the~~ investigation, the commission may avail itself of all information contained in the assessment rolls of various counties; *or in the public records of the various branches of the state government; or of any other information obtainable,* and the commission may at any time ~~of on~~ its own initiative make a revaluation of ~~such the~~ property.”

Section 2. Effective date. [This act] is effective on passage and approval.

Approved April 12, 1995

1

2

Q. What does the italicized wording in Exhibit 22 show?

3

A. The added wording is in italicizes. So anyone may test by looking at the italicize,

4

whether the Montana Supreme Court's 1979 decision concerning application of MCA § 69-3-

5

109 *In Petition of Montana Power Co. for Increased Rates and Charges in Gas and Elec. Services,*

6

was or was not altered by the 1995 amendment to MCA § 69-3-109.

7

Q. Do you have a conclusion based on your background in drafting and interpreting

8

statutes?

9

A. Yes.

10

Q. Did the 1995 amendment to MCA § 69-3-109 affect the following words that were

11

in that statute when the Supreme Court made its 1979 ruling construing those words,

12

namely: “The commission is not bound to accept or use any particular value in determining

1 rates. However, if any value is used, the value may not exceed the original cost of the
2 property?”

3 A. No. 1995 was the only time MCA § 69-3-109 was amended after my 1975 amendment
4 and the 1975 amendment did not change the words you have just quoted. Ironically, the
5 amendment may have changed the outcome in the 1979 case as to the \$5.7 million alleged
6 acquisition adjustment if the utility had been able to show it was in the public interest. But the
7 amendment did not change the meaning or Court’s interpretation of original cost that does not
8 relate to acquisition adjustments or to acquisition adjustments that are not in the public
9 interest. The amendment did allow a valuation of certain acquisition adjustments to exceed
10 original cost if that was in the public interest.

11 So far in the case, NorthWestern has not claimed or proven acquisition adjustments
12 with regard to its street lighting rate base. Nor has it claimed or proven that any acquisition
13 adjustments are in the public interest. And NorthWestern has not demonstrated where it has
14 sought acquisition adjustments to the original cost street lighting customer class rate base in
15 the past. So, that 1995 amendment does not change the outcome here because there is no
16 showing that the rate base here was not modified by the utility requesting and the Commission
17 knowingly granting at any time in the past, acquisition adjustments in the public interest
18 exceeding original cost for street lights.

19 Further, whoever made the legal response to C-006, RFA 6 for NorthWestern appears to
20 have been incorrect when representing to the Commission that the 1995 amendment changed
21 the *Montana Power Co* case ruling in a way that would affect what Complainants are
22 contending here.

1 **Q. NorthWestern’s response to C-006, RFA 6 also denies that the 1979 case, *In Petition***
2 ***of Montana Power Co. for Increased Rates and Charges in Gas and Elec. Services*, is relevant**
3 **to facts or claims in this case because while:**

4 **“the quoted portion of the Court’s decision dealt with determination of rate**
5 **base, part of the first step in setting the Montana Power Company’s rates (see the**
6 **response to Request For Admission C-005). The Court’s decision did not examine or**
7 **consider allocation of revenue requirement to a class or rate design for recovery of the**
8 **allocated revenue requirement.”**

9
10 **What is your response to NorthWestern’s additional analysis?**

11
12 A. NorthWestern’s answer to RFA 5 (referenced in RFA 6) gives an incomplete picture of
13 what occurs in the ratemaking process. It contends: “First, the utility’s overall revenue
14 requirement is determined.” However, first the rate base must be determined. Because, in
15 order to determine revenue requirement, one needs to know the rate base. Then you multiply
16 the rate base by the allowed rate of return to calculate the revenue required. NorthWestern’s
17 explanation leaves out how the revenue requirement must be determined before revenue
18 requirement allocation. Therefore, its claim that the *Montana Power* case is not analogous to
19 the situation here is faulty. In the *Montana Power* case, once the overstated rate base was
20 removed, the revenue required went down. That is the same thing that should happen here if
21 the SB 150 wording adopted into MCA § 69-3-109 is properly applied to limit cost recovery to
22 original cost.

23 **Q. What is your understanding of how an inflated rate base affects revenues?**

24 A. If a rate base is inflated to begin with or if it becomes inflated because revenues from
25 rates are not properly synchronized and matched with depreciation schedules, then the
26 revenue required becomes overstated. Or if revenues are not properly applied to depreciate

1 the asset, the rate base becomes overstated. An overstated rate base in one customer class
2 overstates the revenue needed from that class. The effect is to allocate more revenue than is
3 required to cover the cost of repaying investors for the money they have fronted to buy utility
4 property (i.e., street lights) plus an allowed rate of return. Specific examples of how a rate base
5 can become distorted are in the testimony of Complainants' witnesses.

6 **Q. If the revenue is not obtained from the street lighting class, will it have to come**
7 **from other customer classes?**

8 A. No. Because both the street lighting class rate base and overall rate base will be
9 reduced and thus the commensurate overall revenue required will also be reduced. By
10 multiplying the allowed rate of return by the rate base for each individual customer class, an
11 appropriate amount of revenue will be obtained from each customer class without raising
12 additional revenue from other customer classes when the rate base allocated to street lighting
13 is adjusted to reflect what has actually been paid to reduce the customer class rate base.

14 **Q. You called our attention to MCA § 28-2-701 as being relevant to these proceedings**
15 **Please restate it now so we may consider it further?**

16 A. Yes, MCA § 28-2-701. That law plainly states that an act is not lawful if it is:
17 (1) contrary to an express provision of law;
18 (2) contrary to the policy of express law, though not expressly prohibited; or
19 (3) otherwise contrary to good morals.

20 **Q. Does NorthWestern admit that you have correctly quoted MCA § 28-2-701?**

21 A. Yes. In response to Complainants' First Request for Admissions, C-007 (RFA 7)
22 NorthWestern verified that I correctly quoted MCA § 28-2-701.

1 **Q. NorthWestern’s response to Request for Admissions RFA-7 also contends MCA §**
2 **28-2-701 is not relevant: “to the facts or claims in this case because that statute controls**
3 **contracts and:**

4 **The Commission has no jurisdiction to determine contract disputes as to whether a**
5 **contract is unlawful because it contains those prohibitions noted in the statute. *City of***
6 ***Billings v. Public Service Commission of Montana (1981), 193 Mont. 358, 631 P.2d***
7 ***1295.***

8
9 **Who is the NorthWestern witness that will testify to that RFA-7 response?**

10 A. NorthWestern said: “The witness is unknown at this time.” That would have been on
11 March 20, 2014. Joe Schwartzenberger signed for the answers to interrogatories” and Sarah
12 Norcott, NorthWestern’s Corporate Counsel signed for “objections to interrogatories” There
13 was no objection to Request for Admission (RFA-7), which was admitted and which is not an
14 interrogatory. It is not clear what witness will testify concerning the comment NorthWestern
15 made after admitting RFA-7.

16 **Q. Is Mr. Schwartzenberger an attorney licensed to give opinions about legal matters**
17 **in Montana?**

18 A. There is no online record of a “Schwartzenberger.” being a member of the Montana
19 Bar Association. So perhaps Ms. Norcott is sponsoring NorthWestern’s assertions concerning its
20 response to RFA-7.

21 **Q. As an attorney licensed in Montana, do you agree with the assertion of**
22 **NorthWestern that “The Commission has no jurisdiction to determine contract disputes as to**
23 **whether a contract is unlawful because it contains those prohibitions noted in” MCA § 28-2-**
24 **701?**

1 A. I do not agree with the assertion of NorthWestern that you just read me. As I'll
2 discuss below, the Commission has jurisdiction over contracted rates. And if it were uncertain
3 about its authority in that regard, the Commission is duty bound to raise the issue *sua sponte*
4 by seeking a declaratory judgment in court to decide the issue of whether or not a contract
5 incorporating rates that allow for recovery of revenue in excess of the original cost of utility
6 property requirement of MCA § 69-3-901 is void from the start as was decided in the case of
7 the court's responsibility in *California Pacific Bank v. Small Business Administration*, 557 F.2d
8 218, 223 (9th Cir.1977). Here the long standing rule that a court will not ordinarily allow
9 recovery on an illegal contract, *Hedla v. McCool*, 476 F.2d 1223, 1227 (9th Cir. 1973) ought to
10 be adhered to because "the interest in (the contract's) enforcement is clearly outweighed in the
11 circumstances by a public policy against the enforcement of such terms." Restatement
12 (Second) of Contracts § 320(1) at 53 (Tent. Draft No. 12, March 1, 1977).

13 Also in response to C-008, RFA 8, NorthWestern denied that the PSC has authority to
14 order changes in street lighting contracts NorthWestern has with the City of Billings. I do not
15 agree with that denial either. Whoever made NorthWestern's assertion is misreading the *City of*
16 *Billings v. Public Service Commission of Montana* (1981), 193 Mont. 358, 631 P.2d 1295 case
17 cited in support of that assertion. That case only affirmed the Commission's determination that
18 it did not have authority to modify water district boundaries established by contract. It also
19 clearly recognized Commission jurisdiction to modify or abrogate other contracts involving
20 public utilities by holding at pp. 10 & 11:

21 All contracts entered into by a public utility are subject to the paramount authority of
22 the state to exercise its regulatory powers. *State v. Billings Gas Co.* (1918), 55 Mont.
23 102, 173 P. 799. In order to exercise its regulatory power the PSC must have and does
24 have the power to supersede or modify provisions of contracts made by utilities to the

1 extent that rates and services are affected. *State v. Billings Gas Co., supra; City of Billings*
2 *v. Public Service Commission* (1923), 67 Mont. 29, 214 P. 608. See also *Preston County*
3 *Light and Power Co. v. Renick* (1960), 145 W.Va. 115, 113 S.E.2d 378.

4
5 **Q. Do you know of an instance where an attorney working for the Public Service**

6 **Commission has voiced an opinion contrary to NorthWestern’s assertion that the PSC does**
7 **not have jurisdiction over its contracts?**

8 A. Yes, during a 2/23/10 Commission work session discussing this proceeding
9 Commission Attorney Jim Paine answered a question concerning Commission authority over
10 utility contracts as follows:

11 Commissioner Molnar: Can we really get into the contracts between the city of Billings
12 and NorthWestern or the city of anything and NorthWestern?

13 PSC Attorney Jim Paine: Commissioner Molnar, yes we can as regards to any impact
14 such contracts have on the rates paid by the retail public.

15 **Q. Why did you call MCA § 28-2-701 to the Commission’s attention?**

16 A. MCA § 28-2-701 plainly states that an act is not lawful if it is: (1) contrary to an
17 express provision of law.” That is the PSC can’t approve an Act by NorthWestern, a tariff, or a
18 NorthWestern contract incorporating a tariff, if it is contrary to the express provisions of MCA §
19 69-3-109 a statute that expressly prohibits valuation of utility property in excess of original cost
20 (either when it is originally placed in the rate base or because the rate base has become
21 corrupted in a way that allows recoupment of costs in excess of original cost).

22 Also, MCA § 28-2-701 says an act is not lawful if it is: “(2) contrary to the policy of
23 express law, though not expressly prohibited.” I have stated the policy of MCA § 69-3-109. If
24 the PSC is to adhere to that policy, the PSC can’t approve a contract involving an illegal tariff
25 that allows recovery of revenue that exceeds original cost less depreciation, even though the

1 Commission has considerable latitude in determining how to calculate that depreciation. It
2 simply can't miscalculate depreciation so as to circumvent allowed revenue recovery.

3 **Q. Has NorthWestern acknowledged in its discovery answers that its contracts contain**
4 **clauses indicating rates charged by it are subject to Public Service Commission approval?**

5 A. Yes. See C-042, RPD 1 where NorthWestern was asked to produce copies of any
6 contracts with cities for street lighting service that did not contain such a clause. NorthWestern
7 could not produce any such documents but said it would if its continued search uncovered any.
8 As of March 27, 2015, that Request for Document Production has not been updated.

9 **NORTHWESTERN'S OWNERSHIP CHARGE IS NOT PAYMENT FOR "RENT" OR "LEASE"**
10 **[Proof of Complaint ¶¶ 28.]**

11 **Q. During the more than 52 years that you have practiced law have you had occasion**
12 **to write and review leases and rental agreements and other contracts and review pleadings**
13 **and answers to pleadings?**

14 A. Yes. And as part of my evaluation here, I have reviewed NorthWestern Energy's
15 January 24, 3013, answer to Complaint allegation 28? The allegation and answer were:

16 28) None of the contracts that Northwestern Energy has with the City of
17 Billings for the lighting districts mentioned in Tables 2 & 3 contains the words
18 "lease," "rent," "lessor," "lessee," "landlord," or "tenant," or plurals of those
19 words.

20 Answer: NorthWestern is without sufficient knowledge to admit or deny
21 that all of its contracts with the City of Billings do not have the words contained
22 in the paragraph, but does admit that some of its contracts with the City of
23 Billings do not contain such words.

24
25 **Q. In order to address Complaint allegation 28, is it relevant to know whether or not**
26 **contracts NorthWestern has with the City of Billings contain reference to the words "lease,"**
27 **"rent," lessor," "lessee," "landlord," or "tenant," or plurals of those words?**

1 A. Definitely. In a document presented to the Billings Energy and Conservation
2 Commission, when it was considering new forms of street lighting, a NorthWestern employee
3 contended in six different places that street lights were being leased. For example, she
4 claimed that “all utility owned street lights are **lease** lights and have historically been a **lease**
5 light rate type design.” The full quote (an admission against interest and therefore not hearsay)
6 of what she wrote is at page 21 of “Guide to Understanding Street Lights: City of Billings,” by
7 Deborah Singer, NorthWestern Energy & Dave Mumford, City of Billings:

- 8 • **Ownership charge** – all utility owned street lights are **lease** lights and have
9 historically been a **lease** light rate type design. The **ownership charge** is based on
10 the initial cost of installation of a district and are established based on the total costs
11 to install each particular district and are a per light fee. This is an ongoing fee and it
12 is never paid off and this charge is fully disclosed to property owners as part of the
13 total first year estimated cost for the light as required by Montana codes. **Ownership**
14 **charges** are listed in the *Montana PSC Schedule No. ELDS-1 Electric Lighting*
15 *Delivery Service* tariff which is attached in Appendix D. [Emphasis added]
16

17 Also, a proposed letter drafted for the Billings City Council to approve on 10/28/2013 in
18 support of Complainants herein establishes that the representations of NorthWestern’s
19 employees in Billings left the City Administrator with the impression that the ownership charge
20 was rent for the street lights and she included a reference to that in the letter she drafted for
21 the Council. Since that impression has been used by NorthWestern in dealing with its
22 explanations of its rates and to oppose support for Complainants, it is important to evaluate the
23 claim so the reasons the utility is giving the public and its elected officials for its overcharge may
24 be completely rebutted.

25 **Q. As you read NorthWestern’s answer, to Complaint Allegation ¶ 28, regarding the**
26 **lack of reference to terms connoting a street lighting lease arrangement, what do you notice?**

1 A. NorthWestern does not fully respond to the specific allegation. That is, its answer
2 expands the allegation to all utility contracts and then answers an allegation of its own making
3 which is not at issue. Via this dodge NorthWestern has avoided-addressing just the lighting
4 districts mentioned in Tables 2 & 3 attached to the Complaint--the specific allegation alleged in
5 the complaint. Instead NorthWestern claims it is without sufficient knowledge to know whether
6 all of its contracts with the City of Billings do not contain such words. Your complaint was not
7 asking about all of the contracts NorthWestern had with Billings. That Complaint paragraph
8 only references street lighting contracts in the 25 SILMDs listed on Complaint Table 2 and the
9 75 SILMDs listed on Complaint Table 3.

10 **Q. Do answers to discovery get us any closer to accepting Complaint Paragraph 28?**

11 A. Yes. The discovery also gets us closer to establishing that the ownership charge is not
12 rent. In response to C-009 (RFA 9) NorthWestern admitted that its ELDS-1 tariff does not
13 contain the words 'lease,' 'rent,' 'lessor,' 'lessee,' 'landlord,' or 'tenant,' or plurals of those
14 words.

15 **Q. Why is that admission significant?**

16 A. The ELDS-1 tariff is the tariff that contains the ownership charge component of the
17 street lighting rate. If that tariff were to cover rent, it would have to reveal that it covers rent.
18 Since the ELDS-1 tariff does not even contain the words normally associated with a lease
19 document, it cannot be construed to involve "rent" as a reason for PSC approval of the
20 ownership charge component.

21 **Q. Has NorthWestern admitted that its contracts with the City of Billings are not**
22 **contracts to lease or rent street lights?**

1 A. In response to C-043, RPC 2, NorthWestern said it could not produce “any contracts
2 with the City of Billings for street lighting that do contain the words 'lease,' 'rent,' 'lessor,'
3 'lessee,' 'landlord,' or 'tenant,' or plurals of those words. As of March 20, 2015, NorthWestern
4 has not produced any such street lighting contracts with Billings.

5 Also, in response to C-010 (RFA 10) NorthWestern has admitted that for 105 SILMD
6 contracts with the city of Billings and 7 contracts with Yellowstone County “those contracts do
7 not contain the words noted in subpart a [i.e. ‘lease,’ ‘rent,’ ‘lessor,’ ‘lessee,’ ‘landlord,’ or
8 ‘tenant,’ or plurals of those words], and are not contracts to lease or rent street lights.”
9 NorthWestern said it was unable to admit or deny whether none of the contracts
10 NorthWestern had with the City of Billings for provision of street lighting service in the lighting
11 districts mentioned in Complainants’ Exhibit 5 were contract to lease or rent street lights
12 because NorthWestern “was unable to locate 13 of the possible 125 contracts.”

13 **Q. As part of your testimony in this case, have you reviewed some street lighting**
14 **contracts NorthWestern Energy has with the city of Billings?**

15 A. Yes. I reviewed a pdf file that contains many street lighting contracts NorthWestern
16 has with the city of Billings.

17 **Q. Mr. Towe, I am showing you what has been marked Complainants’ Exhibit 1. Is this**
18 **a disc containing the electronic copy of the pdf file I provided you?**

19 A. Yes. The disc contains an 858 page document with some of the contracts between
20 NorthWestern Energy and the City of Billings for street lighting. It also contains a 1994 tariff for
21 lighting. You gave me an electronic copy of that document.

22 **Q. Where did the document come from?**

1 A. You told me it came from the Billings City Administrator, Tina Volek. It indicates that
2 it was initially provided to the City by NorthWestern Energy. So, it may be considered here as
3 an admission against interest which is not hearsay as defined by MT Code § Rule 801(d)(2)
4 (2014) because Exhibit 1 comes from NorthWestern.

5 **Q. When is the Exhibit 1 cover letter from NorthWestern dated?**

6 A. October 14, 1994.

7 **Q. Mr. Towe, I am again showing you what has been marked Complainants' Exhibit 1.**
8 **What is the first document contained in that exhibit?**

9 A. The first document in it is entitled "Proposal to No-longer Provide Maintenance to
10 City-owned Street Lights After 1-1-95." It is an admission that at the time, NorthWestern was
11 not maintaining the street lights in a timely fashion and a proposal that the maintenance be
12 farmed out to an independent contractor.

13 **Q. I believe you said earlier that Complainants' Exhibit 1 on the disc also contains**
14 **contracts for SILMDs where NorthWestern owned street lights?**

15 A. Yes. The disc contained contracts where NorthWestern owns the lights for all 25 of
16 the SILMDs listed on Table 2 attached to your complaint (namely SILMD numbers 97, 117, 118,
17 159 (listed twice to account for different sized lights), 206, 207, 209, 214, 216, 224, 228, 229,
18 230, 231, 232, 237, 239, 241, 245, 246, 247, 248, 249, 258 & 261); and for 67 of the 75 SILMDs
19 listed on Table 3 attached to your complaint (namely SILMD numbers: 8, 17 (listed twice to
20 account for different sized lights), 99, 107, 109, 114, 115 116, 121, 122, 123, 124*, 125, 126,
21 127, 128, 129, 130, 131, 133,.134, 135, 136(listed twice to account for different sized lights),
22 137, 138, 139, 143, 144, 145, 146, 147(listed twice to account for different sized lights), 149,

1 150, 151, 152, 153, 154, 155, 157, 158, 160, 161, 164, 165, 167, 171, 172, 173, 174, 175, 178,
2 179, 180, 181, 182, 183, 184, 185, 187, 188, 189, 190, 191, 192, 193, 198, 201, 242*, 244*,
3 251*(listed twice to account for different sized lights), 252*, 253*, 262(listed twice to account
4 for different sized lights), 272* & 277*). The eight SILMD numbers with asterisks after them
5 were not included in Complainant's Exhibit 1.

6 **Q. When is the date of the last contract in Complainant's Exhibit 1?**

7 A. That is SILMD 262. There appear to be two dates for it, either July 1, 1996 (on the
8 cover sheet and other notation) or October 10, 1995 (on the contract).

9 **Q. Have you performed an electronic word search on Complainant's Exhibit 1 to**
10 **determine whether or not contracts in it were lease or rental agreement?**

11 A. Yes. You converted the document to searchable form using Adobe Acrobat 9 Pro. I
12 then searched for the words, "lease," "rent," "lessor," "lessee," "landlord," or "tenant," and for
13 plurals of those words, and did not find any of those words in the contracts on the disc that is
14 Complainant's Exhibit 1.

15 **Q. Did Complainant's Exhibit 1 contain contracts for any SILMDs owned by**
16 **NorthWestern that were not listed on Complaint Tables 2 and 3?**

17 A. Yes. There were contracts where lights were owned by NorthWestern in SILMDs #
18 100, 119, 162, 176, 205, and Optimist Park. None of those contracts contained the words
19 'lease,' 'rent,' 'lessor,' 'lessee,' 'landlord,' or 'tenant,' or plurals of those words.

20 **Q. In your years practicing law, have you ever seen a lease or rental agreement that**
21 **did not contain any of the words 'lease,' 'rent,' 'lessor,' 'lessee,' 'landlord,' or 'tenant,' or**
22 **plurals of those words?**

1 A I don't believe I ever have.

2 **Q. Based on your review of the words that are not in the street lighting contract that**
3 **NorthWestern has with Billings, have you reached a conclusion about whether or not that**
4 **contract constitutes a rental agreement?**

5 A. I have.

6 **Q. What is your conclusion?**

7 A. The street lighting contracts that I reviewed for all 25 SILMDs listed on Complaint
8 Table 2 and for 67 of the SILMDs listed on Complaint Table 3 for which we have contracts and in
9 SILMDs # 100, 119, 162, 176, 205, and Optimist Park the contracts were not rental contracts
10 through October 10, 1995. The only charge authorized under them was a charge set by the
11 Public Service Commission. That is not for rent since the contracts do not contemplate rent.
12 Thus, my analysis comports with the admission NorthWestern made in C-010 (RFA 10) that the
13 112 contracts it could find "are not contracts to lease or rent street lights."

14 **Q. What may we conclude about the contracts relating to 13 SILMDs where**
15 **NorthWestern could not find a contract?**

16 A. First, there is no affirmative proof that any SILMD is involved in a contract to "lease or
17 rent street lights." Second, NorthWestern notes in its answer to C-010 (RFA 10) "of the
18 contracts located, the contract terms and conditions are similar meaning a template contract
19 was used." Therefore, it is highly likely that the missing contracts were also template contracts
20 that did not contain any reference to the terms 'lease,' 'rent,' 'lessor,' 'lessee,' 'landlord,' or
21 'tenant,' or plurals of those words.

1 **Q. Is there any other document that leads you to believe that ownership charges**
2 **collected after the original cost of street lights was fully amortized are not rent?**

3 A. A 2004 Great Falls Tribune report by Mike Dennison¹ details arguments made when
4 Great Falls was complaining about street lighting charges. NorthWestern's lobbyist never tries
5 to justify the ownership charge as rent. The statement of NorthWestern's lobbyist is admissible
6 because it is not hearsay, but rather an Admissions of a Party-Opponent under Montana Rules
7 of Evidence, MT Code § Rule 801(d)(2) (2014). The failure to include rent in NorthWestern's
8 lobbyist's explanation is a "tacit admission" or adoption by silence that the ownership charge is
9 not intended to cover rent.

10 **Q. How does John Fitzpatrick, NorthWestern's head of government affairs attempt to**
11 **justify the ownership over-charge?**

12 A. Mr. Fitzpatrick is quoted as saying, "I don't think we have the legal latitude to
13 negotiate a contract with Great Falls in violation of rates set by the PSC." That's an admission
14 that the PSC has authority over the rates in those contracts. But it ignores the fact that the
15 Commission had no authority to set rates that allow recovery of more than the original cost of
16 the street lights plus a reasonable rate of return.

17 **Q. What other justification does Mr. Fitzpatrick give for the ownership charge?**

18 A. Mr. Dennison wrote:

19 Fitzpatrick said while ownership fees on certain poles may seem unfair, they
20 cover the construction and maintenance costs of streetlights in NorthWestern Energy's
21 entire Montana system.

22 The costs for one area may be higher one year, essentially receiving a subsidy by
23 cities in other areas, but those latter cities could end up being the high-cost area the
24 next year, he said.

¹ <http://www.greatfallstribune.com/news/stories/20040229/localnews/47024.html>

1 For example, if an ice storm knocks out 150 streetlights and wires in Great Falls,
2 the company doesn't increase the fees that year for that lighting district -- it just pays
3 for the high-cost maintenance out of the statewide pool of funds, Fitzpatrick said.

4 "All of these costs are pooled together, and they're done on an average basis,"
5 he said. "I think there's a lot of misunderstanding on how these things operate, and I
6 think there's a big mistake being made in thinking there's some sort of pot of gold at the
7 end of rainbow." [Sic.]

8 The company doesn't keep figures on how much maintenance or construction
9 costs occur for each city, he said.

10
11 **Q. Does the ownership charge cover maintenance costs caused by ice storms and**
12 **other events that damage the lights?**

13 A. Not under most of the contracts found in Complainants' exhibit 1. They contain
14 clauses allowing the utility to charge the city extra to cover those costs. The ice storm example
15 used by Mr. Fitzpatrick is misleading because the city pays for force majeure damage pursuant
16 to Clause 5, 6, or 7, especially in the newer contracts. For example, Clause 7 of the contract in
17 Mr. Barsanti's SILMD 228² reads:

SECTION 7. FORCE MAJEURE

18 **It is understood and agreed that the Company shall not be liable for failure
to comply with any of the terms and conditions of this agreement where such
failure is caused by acts of God, governmental regulations or orders, strikes or
labor difficulties, fire, floods, droughts, riots, destruction of property, or
without being limited by the foregoing, by any other cause beyond the reasonable
control of the Company.**

19 **Q. Is there another document by a NorthWestern representative other than Mr.**
20 **Fitzpatrick that tells who pays for a pole that is damaged in a lighting district?**

21 A. At page 18 of "Guide to Understanding Street Lights: City of Billings," by Deborah
22 Singer, NorthWestern Energy & Dave Mumford, City of Billings, it says:

- 23 • **Each district is accounted for separately and must be clearly identified as a**
24 **specific fund with the Special improvement Lighting District Number established**

² Complainants' Exhibit 1, page 707

1 **per MCA 7-12-4331, 7-12-4334 and 7-12-4341.** All funds for each district are kept in
2 that district. **The money in each district is invested and the interest is used to**
3 **help pay the costs for that district reducing costs to property owners.**

4 It is the responsibility of the City of Billings Finance Director to insure that all
5 assessments to property owners are properly accounted for and in the specific district
6 fund. **By statue the City cannot mix street light district funds collected through**
7 **assessments and any costs or savings associated with improvements in a**
8 **specific district must remain with each specific district.**

9 **For example, if a City owned district has a pole damaged by an accident, the**
10 **funds to install a replacement pole can only come from that specific district's**
11 **funds. [Emphasis added]**
12

13 **Q. I heard a Councilman in Billings say several years ago that he liked the fact that if a**
14 **drunk hit a pole or someone shot out a light, NorthWestern would pay for the costs of fixing**
15 **it. Is that true?**

16 A. It does not appear to be true under most of the contracts in Complainants' Exhibit 1.
17 Clauses 2, 4, 5, or 6 of those contracts make the city pay for Other Repair or Wanton Damage.
18 At least, the Company is not legally required to pay for these type of costs. For example, Clause
19 5 of the contract in Mr. Barsanti's SILMD 228³ reads: ...

**The charges above shown for the system are based upon estimated normal wear and
breakage of lamps and glassware. It is within the police power of the City to
prevent or punish persons responsible for wanton and malicious damage to street
lights. In consequence thereof, the Company shall have the right to make an addi-
tional charge to the City for the actual cost of the material and labor for repairs
to and replacements in said system, made necessary by the acts of third parties.**

**Bills for said services shall be due and payable in cash or valid warrants at
the office of the Company in Billings, Montana when rendered each month and will
become delinquent ten (10) days thereafter.**

20
21 **Q. Mr. Fitzpatrick is reported to have said that ownership charges cover maintenance**
22 **costs. Is that typically separate from the ownership charge?**

23 A. Yes. You can see it on the bills in Complainant's Exhibit 8, "June 2009 bills to Billings
24 for NorthWestern owned Street Lights."

³ *Id.*

1 **Q. Is there another way to tell that Maintenance charges are separate from the**
2 **ownership charge?**

3 A. Yes, NorthWestern admitted C-012 (RFA 12) that:

4 ... in addition to levying an ownership charge, Northwestern Energy's Schedule
5 No. ELDS-I (Electric Lighting Delivery Service Tariff), references as components of a
6 monthly bill, the charges for the energy used, for transmission and distribution of that
7 energy, and charges to cover billing, operation, maintenance, USBC and CTC-QF
8 expenses (See Tariff Sheet 40.2)

9
10 **Q. So when Mr. Fitzpatrick said, "I think there's a lot of misunderstanding on how**
11 **these things operate," was he correct?**

12 A. If he was striving for a clear understanding, he should have acknowledged the *force*
13 *majeure* clauses and told the folks in your home town that the ownership charge is separate
14 from the maintenance charge and from the operations and billing and other charges which are
15 levied on each light separately. NorthWestern's answers to C-061, I 17, detail what the LS
16 operations charge pays for by referencing paragraph 4(B) of the ELDS-1 tariff Special Terms and
17 confirms that customers may be required to pay the cost of vandalism and damage occurring
18 within their district contrary to the impression Mr. Fitzpatrick portrayed.

19 **Q. Is there other conclusive evidence that the ownership charge is not meant to cover**
20 **rent?**

21 A. Yes. Any plant in service as Leased Property on Customer Premises would normally be
22 listed in Account 372 of NorthWestern's Form 1 Report to the Federal Energy Regulatory
23 Commission (FERC).

24 **Q. I am showing you what has been marked as Complainants' Exhibit 23. Do you**
25 **recognize it?**

1 A. Yes. It is part of a page from NorthWestern’s Fourth Quarter 2013 Report to FERC
 2 dated 12/31/13. This page shows the Distribution Plant Account 372 amount as zero. You can
 3 see it from this print of the document on line 72 entitled “Leased Property on Customer
 4 Premises”:

Name of Respondent NorthWestern Corporation		This Report Is: (1) <input checked="" type="checkbox"/> An Original (2) <input type="checkbox"/> A Resubmission	Date of Report (Mo, Da, Yr) 12/31/2013	Year/Period of Report End of 2013/Q 4
ELECTRIC PLANT IN SERVICE (Account 101, 102, 103 and 106) (Continued)				
Line No.	Account (a)	Balance Beginning of Year (b)	Additions (c)	
47	3. TRANSMISSION PLANT			
48	(350) Land and Land Rights	22,832,612	806,038	
49	(352) Structures and Improvements	26,243,836	2,942,639	
50	(353) Station Equipment	245,446,081	3,257,307	
51	(354) Towers and Fixtures	28,733,308		
52	(355) Poles and Fixtures	190,032,012	16,609,932	
53	(356) Overhead Conductors and Devices	161,804,455	5,863,339	
54	(357) Underground Conduit	562,495	523	
55	(358) Underground Conductors and Devices	3,795,540	3,472	
56	(359) Roads and Trails	2,519,640		
57	(359.1) Asset Retirement Costs for Transmission Plant			
58	TOTAL Transmission Plant (Enter Total of lines 48 thru 57)	681,969,979	29,483,250	
59	4. DISTRIBUTION PLANT			
60	(360) Land and Land Rights	6,103,734	48,576	
61	(361) Structures and Improvements	9,811,064	305,969	
62	(362) Station Equipment	164,404,865	8,439,796	
63	(363) Storage Battery Equipment			
64	(364) Poles, Towers, and Fixtures	214,175,041	18,758,253	
65	(365) Overhead Conductors and Devices	119,290,218	4,854,624	
66	(366) Underground Conduit	74,834,779	5,674,024	
67	(367) Underground Conductors and Devices	153,500,767	15,695,087	
68	(368) Line Transformers	216,424,675	8,413,105	
69	(369) Services	113,236,632	3,884,227	
70	(370) Meters	58,184,553	1,855,407	
71	(371) Installations on Customer Premises	99,972	17,260	
72	(372) Leased Property on Customer Premises			
73	(373) Street Lighting and Signal Systems	59,600,239	591,462	
74	(374) Asset Retirement Costs for Distribution Plant	51,114	5,240,300	
75	TOTAL Distribution Plant (Enter Total of lines 60 thru 74)	1,189,717,653	73,778,090	

6 **Q. Is there any other part of NorthWestern’s 12/31/2013 Form 1 Report to FERC that**
 7 **deals with property NorthWestern leases to others?**

8 A. Yes. It is found on page 213 of that Report.

9 **Q. I am showing you what has been marked as Complainants’ Exhibit 24. Do you**
 10 **recognize that exhibit?**

1 A. Yes. It is a copy of the first few lines of page 213 of NorthWestern's 12/31/2013 Form
2 1 Report.

3 **Q. What does Exhibit 24 indicate?**

4 A. NorthWestern did not list any leases of equipment to others. You can see it below.
5 The rest of the page is also blank.

6 **COMPLAINANTS' EXHIBIT 24**

Name of Respondent NorthWestern Corporation		This Report Is: (1) <input checked="" type="checkbox"/> An Original (2) <input type="checkbox"/> A Resubmission		Date of Report (Mo, Da, Yr) 12/31/2013	Year/Period of Report End of 2013/Q4
ELECTRIC PLANT LEASED TO OTHERS (Account 104)					
Line No.	Name of Lessee (Designate associated companies with a double asterisk) (a)	Description of Property Leased (b)	Commission Authorization (c)	Expiration Date of Lease (d)	Balance at End of Year (e)
1					
2					
3					
4					
5					
6					

7
8 **Q. I am showing you what has been marked as Complainants' Exhibit 25. Do you**
9 **recognize that exhibit?**

10 A. Yes. It is a copy of the first few lines of page 217 of NorthWestern's 12/31/2013 Form
11 1 Report. Page 217 deals with Accumulated Provision for Depreciation of Electric Utility Plant
12 (Account 108).

13 **Q. What does Column (e) on page 217 of Exhibit 25 indicate?**

14 A. Column (e) would be for listing changes to electric plant leased to others during the
15 year, as would line 5 for Account 413, Changes in Electric Plant Leased to Others. NorthWestern
16 did not list any changes, either in Column (e) or on line 5. You can see it below:

17

COMPLAINANTS' EXHIBIT 25

Name of Respondent NorthWestern Corporation		This Report Is: (1) <input checked="" type="checkbox"/> An Original (2) <input type="checkbox"/> A Resubmission		Date of Report (Mo, Da, Yr) 12/31/2013	Year/Period of Report End of 2013Q4
ACCUMULATED PROVISION FOR DEPRECIATION OF ELECTRIC UTILITY PLANT (Account 108)					
<p>1. Explain in a footnote any important adjustments during year.</p> <p>2. Explain in a footnote any difference between the amount for book cost of plant retired, Line 11, column (c), and that reported for electric plant in service, pages 204-207, column 9d), excluding retirements of non-depreciable property.</p> <p>3. The provisions of Account 108 in the Uniform System of accounts require that retirements of depreciable plant be recorded when such plant is removed from service. If the respondent has a significant amount of plant retired at year end which has not been recorded and/or classified to the various reserve functional classifications, make preliminary closing entries to tentatively functionalize the book cost of the plant retired. In addition, include all costs included in retirement work in progress at year end in the appropriate functional classifications.</p> <p>4. Show separately interest credits under a sinking fund or similar method of depreciation accounting.</p>					
Section A. Balances and Changes During Year					
Line No.	Item (a)	Total (c+d) (b)	Electric Plant in Service (c)	Electric Plant Held for Future Use (d)	Credits Plant Retired to Others (e)
1	Balance Beginning of Year	1,180,837,405	1,180,837,405		
2	Depreciation Provisions for Year, Charged to				
3	(403) Depreciation Expense	86,127,605	86,127,605		
4	(403.1) Depreciation Expense for Asset Retirement Costs				
5	(413) Exp. of Elec. Plt. Less. to Others				
6	Transportation Expenses-Clearing				
7	Other Clearing Accounts				
8	Other Accounts (Specify, details in footnote):				
9					
10	TOTAL Deprec. Prov for Year (Enter Total of lines 3 thru 9)	86,127,605	86,127,605		
11	Net Charges for Plant Retired:				
12	Book Cost of Plant Retired	32,686,355	32,686,355		
13	Cost of Removal	7,170,169	7,170,169		
14	Salvage (Credit)	906,043	906,043		
15	TOTAL Net Chrgs. for Plant Ret. (Enter Total of lines 12 thru 14)	38,950,481	38,950,481		
16	Other Debit or Cr. Items (Describe, details in footnote):	541,075	541,075		
17					
18	Book Cost or Asset Retirement Costs Retired				
19	Balance End of Year (Enter Totals of lines 1, 10, 15, 16, and 18)	1,237,355,604	1,237,355,604		
Section B. Balances at End of Year According to Functional Classification					
20	Steam Production	202,492,966	202,492,966		
21	Nuclear Production				
22	Hydraulic Production-Conventional				
23	Hydraulic Production-Pumped Storage				
24	Other Production	42,231,408	42,231,408		
25	Transmission	326,489,773	326,489,773		
26	Distribution	615,526,487	615,526,487		
27	Regional Transmission and Market Operation				
28	General	50,614,970	50,614,970		
29	TOTAL (Enter Total of lines 20 thru 28)	1,237,355,604	1,237,355,604		

1 **Q. What do you conclude about the fact that the 372 plant account, the account 104**
2 **list of electric plant leased to others, and column (e) of account 108 are blank?**

3 A. The 372 plant account is described as “Leased Property on Customer Premises.”
4 NorthWestern describes its street lighting customers as cities. Therefore, if NorthWestern
5 owned street lights that were leased but located on city streets, they would be in this account.
6 Since there are no entries related to leased property (i.e., street lights) located on city streets
7 (i.e., customer premises), (the Form 1 subaccount (372) where that leased plant would have
8 been reported), the street lights are not leased lights, but rather lights carried in the utility
9 plant in service sub-account 373 located on line 73. Therefore, we may conclude that since no
10 leased plant is reported in account 372, since the contracts for utility service do not contain the
11 words one would normally find in a lease, and since the ELDS-1 tariff does not define charges as
12 being for rent or lease payments, the claim made by Ms. Singer to city officials in Billings that
13 “all utility owned street lights are **lease** lights and have historically been a **lease** light rate type
14 design...” appears to be incorrect.

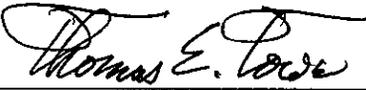
15 **Q. Was it your intent when sponsoring SB 150 to allow payments for utility plant made**
16 **by customers to be described as “rent” so the utility could recover more than the original cost**
17 **of that plant plus a reasonable return on investment?**

18 A. No. As I have previously testified, any Commission approval of a tariff allowing
19 NorthWestern or Montana Power to collect revenues on assets valued in excess of original cost
20 less depreciation plus an allowed rate of return would have been an illegal or *ultravires* act that
21 was void from the start or *void ab initio* regardless of whether it was called rent, ownership
22 charge, or something else. NorthWestern cannot evade the law by labeling a payment made to

1 cover the original cost of infrastructure, "rent." The Commission cannot approve something it
2 has no authority to approve. Such approval would be an *ultravires* act.

3 And I thank the Commissioners for the attention given my testimony.

4 I, Tom Towe, do hereby certify that this 50 pages of typewritten material is a full,
5 correct, and truthful rendition of my pre-filed written testimony given under oath.

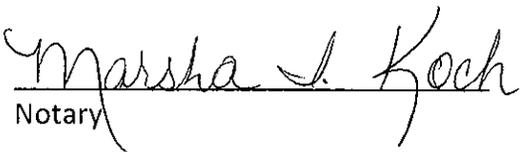
6 
7 _____

8 Thomas E. Towe

9
10 State of Montana

11
12 County of Yellowstone

13
14 Signed and affirmed to before me on March 27, 2015 by Tom Towe.

15 
16 _____
17 Notary

