

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

IN THE MATTER OF THE PETITION OF JAMES T.)
AND ELIZABETH A. GRUBA; LEO G. AND JEANNE)
R. BARSANTI ON BEHALF OF THEMSELVES &) REGULATORY DIVISION
OTHERS SIMILARLY SITUATED,)
Complainants.)
VS.)
NORTHWESTERN ENERGY,) DOCKET NO. D2010.2.14
Defendant.)

4
5
6 REQUEST FOR DECLARATORY RULING TO INTEREPRET ARM 38.2.1207
7 OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO AMEND

8
9 BRIEF IN SUPPORT OF

10
11 REQUEST FOR DECLARATORY RULING TO INTEREPRET ARM 38.2.1207

12
13 Required contents of Request:

14
15 (a) the name and address of petitioner (Petitioner Leo Barsanti's name appears in the
16 caption and his address is in the attached affidavit of service.); and

17
18 (h) the name and address of Respondent NorthWestern Energy and Consumer Council
19 (i.e., any persons known by petitioner to be interested in the requested declaratory
20 ruling) appear in the attached affidavit of service.

21
22 (b) a detailed statement of the facts upon which petitioner requests the agency to
23 base its declaratory ruling follows:

24
25 BACKGROUND

26
27 PSC Order No. 7084i has required Complainants to strike portions of their testimony. To
28 comply with that order, Complainants are striking attorney comments and references to LED
29 lighting or other matters outside of ownership overcharge considerations by either eliminating
30 them or interlineating them. Some stricken portions are being interlineated to show that they

1 have been eliminated from consideration while also preserving them for the remedy phase of the
2 proceeding or for purposes of showing offers of proof.

3 In places where qualifications to testify or relevancy concerns might have been raised if a
4 specific motion to strike had been made, Complainants are adding foundation and relevancy
5 testimony. The justification for those additions is that they would be allowed to add foundation
6 and relevancy considerations at hearing once a proper motion to strike has been made to specific
7 portions of the testimony. So far, few motions to strike specific lines of testimony have been
8 made.

9 In ordering Complainants to strike their testimony via general reference, without
10 specifying which portions to strike, the February 24, 2015, Commission Staff Action cautioned
11 Complainants Attorney to avoid filing changes in Complainants pre-filed written testimony,
12 saying “Complainants are not authorized to add material to their written, pre-filed testimony.”

13 Complainants respectfully note the Commission’s Rule does not require authorization to
14 amend documents at this point. It allows amendment as a matter of right prior to when a hearing
15 date has been set.

16 **(d) the rule or statute for which petitioner seeks a declaratory ruling is Rule,**

17
18 ARM 38.2.1207 which says:

19
20 38.2.1207 AMENDMENTS

21 (1) Any pleading or document may be amended prior to notice of the hearing.
22 After notice of a hearing is issued, motion for leave to amend any pleading or document
23 may be filed with the commission and may be authorized in the discretion of the
24 commission or the hearing examiner.

25
26 The hearing date in this case was postponed via the April, 17, 2014 Notice of Staff
27 Action vacating all dates “yet to occur” after April 17, 2014. The hearing date has not been re-

1 noticed. So until a new date is noticed, it appears that Commission approval to amend does not
2 have to be sought.

3 **(e) The question presented here is:** Once a hearing date has been vacated, may pre-filed
4 testimony be amended and additional testimony added prior to a new notice of a hearing or must
5 pre-filed and additional testimony be authorized by a commission exercising reasonable
6 discretion.

7 **(f) propositions of law asserted by petitioner:** The question here is similar to the issue
8 of whether a petition may be amended pursuant to ARM 38.2.1207 prior to notice of the hearing
9 that was decided in favor of Complainants earlier in this proceeding in *Williamson v. Montana*
10 *Public Serv. Comm'n*, 2012 MT 32 at 34-5 (Mont., 2012). The facts here are as similar to the
11 facts in *Williamson* as to be indistinguishable. In *Williamson*, ¶ 53, the Court opined: “An
12 administrative agency must comply with its own administrative rules.”

13 **(g) the specific relief requested:** Thus, we are accompanying this amended testimony of
14 Tom Towe, Leo Barsanti, and James Gruba and additional testimony of Russell L. Doty with a
15 request (under ARM 1.3.226 through 1.3.229 as adopted by ARM 38.2.101) for the
16 Commission’s declaratory ruling to interpret ARM 38.2.1207 to comport with the *Williamson*
17 ruling.

18 **(c) sufficient facts to show that petitioner (and other parties) will be affected by the**
19 **requested ruling:**

20 Many numbers in the case have changed markedly in the year that has elapsed since
21 Complainants first pre-filed their written testimony in March of 2014. And, NorthWestern has
22 filed discovery that has affected those numbers. In addition, other parties in the case have not
23 filed their testimony yet. Since some of Complainants witnesses are not being allowed to testify

1 about matters within the purview of experts, Complainants, not being able to afford to hire an
2 expert witness, must file additional expert testimony of Russell L. Doty, their attorney herein.
3 Attorney as a witness issues are addressed in Mr. Doty's Pre-filed written testimony.

4 Also, as discussed more fully below, no party in this case will be prejudiced by the
5 amendments to the pre-filed testimony. They will still have ample time to address the changes.

6 If Complainant' address as much of NorthWestern's discovery responses as is possible
7 now, NorthWestern will have the opportunity to rebut in its initially filed testimony.

8 The February 24, 2015, Commission Staff Action states: "Complainants will have the
9 opportunity to file rebuttal testimony, in which Complainants will be able to incorporate any
10 discovery responses they receive."

11 However, Complainants have the burden of proof to show a *prima facie* case in their
12 direct case or face a motion to dismiss. Further, if Complainants bring up issues on surrebuttal
13 not addressed in NorthWestern's initial rebuttal testimony, NorthWestern will not have an
14 opportunity to respond and will likely object. So it may not be correct to say that Complainants
15 will have an opportunity to present information regarding answers to the discovery as part of
16 rebuttal. As decided in *Williamson* Complainants have a right to build a record on comments
17 made by NorthWestern's discovery responses which are online as having been filed in the case.

18 **ALTERNATIVE MOTION FOR LEAVE TO AMEND**

19
20 However, if the Commission interprets ARM 38.2.1207 to require a motion for leave to
21 amend at this point in the proceedings, then Complainants so move. Complainants' authority for
22 this request is found in *Williamson, supra* at ¶51 which reads:

23 ¶51 The policy of the law "is to permit amendments to the pleadings in order that
24 litigants may have their causes submitted upon every meritorious consideration that may
25 be open to them; therefore, it is the rule to allow amendments and the exception to deny
26 them." *Union Interchange, Inc. v. Parker*, 138 Mont. 348, 353-54, 357 P.2d 339, 342

1 (1960). This does not mean, of course, that a motion to amend must be automatically
2 granted. *Allison v. Town of Clyde Park*, 2000 MT 267, ¶ 20, 302 Mont. 55, 11 P.3d 544.
3 The decision to grant or deny a motion to amend lies within the courts—or, as here, the
4 PSC's—discretion. *Farmers Coop. Assn. v. Amsden, LLC*, 2007 MT 286, ¶ 12, 339 Mont.
5 445, 171 P.3d 690; Admin. R. M. 38.2.1207, 38.2.2105. [Footnotes omitted.]
6

7 Further, in *Williamson* at ¶ 53, the Court opined:

8 "[A]n agency, vested with discretion, abuses that discretion when it behaves as if it has
9 no other choice than the one it has taken" *Clark Fork Coalition v. Mont. Dept. of Env'tl.*
10 *Quality*, 2008 MT 407, ¶ 43.

11 In discussing the conditions under which leave to amend a pleading should be granted
12 after amendment by right is no longer possible, Wright notes at page 311:

13 The rule provides, however, that "leave shall be freely given when justice so
14 requires," and refusal to permit amendment is an abuse of discretion in the absence of
15 some justification for the refusal.¹ . . . The test whether amendment is proper is functional
16 rather than conceptual. It is entirely irrelevant that a proposed amendment changes the
17 cause of action or the theory of the case, or that it states a claim arising out of a
18 transaction different from that originally sued on, or that it causes a change in parties.²
19 Normally leave to amend should be denied only if it would cause actual prejudice to an
20 adverse party. . . . [Emphasis added.]
21

22 Since neither NorthWestern nor the Consumer Counsel has filed their testimony, and
23 since no deadline for that testimony to be filed has yet been set, the hearing officer may give
24 them ample opportunity to defend after amendments to Complainants' testimony are made and
25 additional testimony filed. Preventing amendment under these circumstances when amendment

¹ Citing *Foman v. Davis*, 1962, 83 S.Ct. 227, 230, 371 U.S. 178, 182, 9 L.Ed.2d 222; *Lone Star Motor Import v. Citroen Cars Corp.*, C.A. 5th, 1961, 288 F.2d 69, 75; 6 Wright & Miller, *Federal Practice and Procedure*: Civil §§ 1484, 1487.

² Citing *Sherman v. Hallbauer*, C.A. 5th, 1972, 455 F.2d 1236; *Polin v. Dun & Bradstreet, Inc.*, C.A. 10th, 1975, 511 F.2d 875; *Staggers v. Otto Gerdau Co.*, C.A.2d, 1966, 359 F.2d 292; and cases cited 6 Wright & Miller, *Federal Practice and Procedure*: Civil § 1474 nn. 98-10.

1 causes no prejudice to the other parties would be an abuse of discretion. Indeed, in Docket No.
2 D95.9.128 at [http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D95-9-](http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D95-9-128_OUT_19960206_NCA.pdf)
3 [128_OUT_19960206_NCA.pdf](http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D95-9-128_OUT_19960206_NCA.pdf) the PSC denied Montana Power's objection to late filed
4 testimony saying "...MPC would not be prejudiced by the late filing because the Commission had
5 granted MPC's request for additional time to file discovery on intervenor testimony." The amended and
6 late-filed testimony in this case is much like the late filed testimony in Docket No. D95.9.128.

7 Respectfully submitted.

March 27, 2015

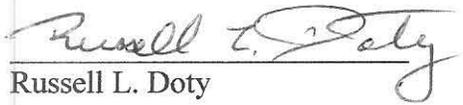
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9 

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14

CERTIFICATE OF SERVICE

I certify that pursuant to ARM 38.2.313, 38.2.1209 and the Procedural Order dated January 16, 2014, on March 27, 2015, an accurate copy of **Complainants' Motion to Amend in Docket No. D2010.2.14** were served upon the parties listed below in the manner provided:

<input checked="" type="checkbox"/> US Mail Original <input type="checkbox"/> Hand-deliver <input checked="" type="checkbox"/> E-mail:	Kate Whitney, Montana Public Service Commission 1701 Prospect Av, PO Box 202601, Helena, MT 59620-2601 Email: kwhitney@mt.gov
<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Hand-delivery <input checked="" type="checkbox"/> E-mail:	Laura Farkas, Montana Public Service Commission 1701 Prospect Av, PO Box 202601, Helena, MT 59620-2601 Email: lfarkas@mt.gov
<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> E-mail:	Robert A. Nelson, Montana Consumer Counsel 111 North Last Chance Gulch, Suite 1B Box 201703 Helena MT 59620-1703 Email: robnelson@mt.gov
<input type="checkbox"/> US Mail <input type="checkbox"/> Hand-delivery <input checked="" type="checkbox"/> E-mail:	Sarah Norcott, Esq., Attorney for NorthWestern Energy 208 N Montana Ave., Suite 205, Helena, MT, 59601 Email: sarah.norcott@northwestern.com
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 Russell L. Doty