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**DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA**

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

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**COMPLAINANTS' REPLY TO NWE RESPONSE TO COMPLAINANTS' MOTION
AMEND TESTIMONY**

RESPONSIVE BRIEF SUPPORTING MOTION

Only two issues need be decided to rule on Complainant's request to amend testimony:

- 1) Whether allowing amendment of complainants' testimony at this time in the proceeding will unjustly prejudice any party in the case or cause undue delay, and
- 2) Whether the additional testimony of Russell Doty, who is also an attorney in the case violates Rule 3.7 of the Montana Rules of Professional Conduct.

1) Complainants were required to amend their testimony by the Commission and eliminate certain portions of it. Hence it makes sense for Complainants to simultaneously amend their testimony to include offers of proof or to lay of additional foundation about eliminated portions. To deny Complainants that opportunity, denies them due process and complicates presentation of Complainant's case unnecessarily by making it difficult for reviewing authorities to follow the record.

NorthWestern has copies of the amended testimony. It has failed to state in its response to this motion how it would be prejudiced by the amendment or how the amendments will cause

1 undue delay. Therefore, since all parties will have ample opportunity to address Complainant's
2 amended testimony, it ought to be allowed.

3 NorthWestern's only defense is that the February 24, 2015, staff action specifically forbid
4 Complainants from adding material to their amended pre-filed testimony. Complainants were
5 only allowed to strike portions from it. Staff's rationale for making that ruling was that
6 Complainants would have the opportunity to address discovery responses, etc. in Complaint's
7 rebuttal testimony. As Complainant's brief (page 4, lines 11 - 17), and attorney witness Towe's
8 (Amended testimony in affidavit form under oath page 2, line 5 through page 3, line 15) pointed
9 out, that would not necessarily be the case.

10 Further, the Commission has decided to forgo making a declaratory ruling on whether the
11 wording NorthWestern quoted from the February 24, 2015, Staff Action violated Commission
12 Rule ARM 38.2.1207. Therefore, any consideration of the admonition in the February 24, 2015
13 Staff Action is not material here. If that admonition is to be taken into consideration, then the
14 Commission will have in effect given a declaratory ruling on the matter subject to the law
15 surrounding declaratory rulings.

16 2) NorthWestern's objection to witness testimony filed by attorney Doty is based on a
17 claim that Doty's acting as both attorney and witness before the PSC violates Rule 3.7 of the
18 Montana Rules of Professional Conduct. Doty supplies precedent for a determination that Rule
19 3.7 does not apply in administrative proceedings. See advisory Ethics Opinion 140519 of the
20 Montana Bar Association attached to NorthWestern's Reply Brief.

21 Also a clear reading of Rule 3.7 and cases construing it indicates it only applies in (jury)
22 trials and not in hearings. As NorthWestern's Reply Brief (page 6, lines 5 - 7) admits references
23 to the word "trial," shall be construed to mean "hearing."

1 NorthWestern contends (page 5 line 15 & footnote 10) the issue of whether Rule 3.7
2 applies in hearing situations has been determined by the Commission and should not be
3 addressed again. However, when that determination was made Ethics Opinion 140519 had not
4 been issued. As Doty explains in his pre-filed testimony (page 2, lines 12 -14 reprinted below),
5 he is revisiting the issue here so that Ethics Opinion may be considered. In several places the
6 ethics opinion explains the rule is to “avoid confusing [a] jury about what is testimony and what
7 is argument.” Complainants accept the tacit assumption that the Commission is able to
8 differentiate between the two (evidence and argument)--as would be a court in a trial without a
9 jury setting--another instance where Rule 3.7 does not apply.

10 NorthWestern (Reply Brief page 5, lines 5 - 9) confuses the application of Rule 3.7 in
11 trial situations to this administrative hearing situation by treating the terms “trial” and “hearing”
12 to have the same meaning while contending:

13 The Doty Testimony however, fails to recognize that the Ethics Opinion goes on
14 to note that Rule 3.7 does not permit him to also then act as the Complainants’ attorney at
15 hearing. Ethics Opinion 140519, page 2, which has been attached hereto for the
16 Commission’s benefit, provides that “[c]ase law construing the rule generally limits
17 disqualification of a lawyer-witness as trial counsel.” [NorthWestern omitted the words at
18 the end of the quote: “but not from participation in pretrial matters.”]
19

20 While Complainants acknowledge Rule 3.7 and surrounding case law applicable to jury
21 “trials” limits (unless an exception is applied) a lawyer-witness as trial counsel, that
22 disqualification does not apply in administrative hearing settings.

23 Further, even in trial settings a lawyer-witness would be permitted to testify pursuant to
24 the Rule 3.7(a)(3) exception in situations where: “(3) disqualification of the lawyer would work
25 substantial hardship on the client.” Who else can give expert witness testimony indicating
26 NorthWestern has violated Montana’s original cost depreciated accounting and that its street
27 lights installed prior to 1997 would be fully depreciated by now? For decades, the experts from

1 the utility and elsewhere have let this oversight continue. How is it unethical for Mr. Doty to
2 now address that oversight?

3 NorthWestern laments (page 6, lines 10 -11) that Complainants have not cited Montana
4 case law supporting the position that Rule 3.7 does not apply in administrative proceedings or in
5 (non-jury) hearings. NorthWestern does not cite Montana case law on the matter either. There do
6 not appear to be Montana cases on the issue either way. What Complainants do cite, however, is
7 the Montana Ethics Opinion 140519. It has several case law citations from other jurisdiction that
8 support Doty's position. Doty references those in his pre-filed testimony in affidavit form under
9 oath (page 1, line 15 through page 5, line 6). It is reprinted below:

10 **Q. Why are you testifying in this proceeding?**

11 A. Bruce Simon a former Legislator from Billings alerted me to what he thought
12 was an overcharge in street lighting. I looked into his allegations and brought this case.
13 Bruce has since died. Before he died he submitted pre-filed testimony under oath. I will
14 stand for cross-examination on that testimony on his behalf. In addition, there are certain
15 matters that I have investigated and will comment on in lieu of hiring an expert witness,
16 which Complainant's cannot afford.

17 **Q. Are you a lawyer in this proceeding?**

18 A. Yes.

19 **Q. Are you familiar with Rule 3.7 of the Montana Rules of Professional**
20 **Conduct?**

21 A. Yes. I briefed that rule in this proceeding.

22 **Q. Are you also aware of the PSC Order 7084i ruling in this proceeding**
23 **ordering you to strike all attorney testimony?**

24 A. Yes.

25 **Q. Then why are you submitting this testimony?**

26 A. I have researched Rule 3.7 and discussed it a couple of times prior to the
27 Commission's Order 7084i and after it with Ethics Council at the Montana Bar
28 Association. Those discussions and other research lead me to the conclusion that I have
29 not violated any ethical restraint and am not doing so by submitting this testimony. The
30 Commission may not be aware of Ethics Opinion 140519 that appeared in June/July Issue
31 of the Montana Bar Association, pp. 10-12. It appeared after the issue of "attorney as a
32 witness" was briefed in this proceeding and comports substantially with the views
33 expressed in my brief.

34 If after considering Ethics Opinion 140519, the Commission or its hearing
35 examiner or attorneys believe my interpretation is wrong, they may of course seek a
36 clarification from the Court or other appropriate body. I would be happy to join in
37 seeking such an opinion.

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Meanwhile, I have complied with the Commission order by striking attorney comments from the other pre-filed testimony even though Rule 3.7 would not require me to do so.

In addition, I respectfully submit that the Commission only quoted part of Rule 3.7 in Order 7084i, leaving out consideration of important distinctions. That quote left the impression that I was being unethical in dealing with prepared written testimony; it's not an impression that anyone would want as the capstone of a pro bono effort to bring justice to Montana's municipalities. In PSC Docket No. D2010.2.14, Order No. 7084i, the Commission found:

36. ... Rule 3.7 of the Montana Rules of Professional Conduct makes it clear that it is generally inappropriate for a lawyer acting as an advocate to testify. No examples have been provided of an instance in which a lawyer representing a party before the Commission was permitted to testify in that same proceeding.

This ruling leaves out the reference to "at a trial." This is not a trial before a jury. It is an administrative hearing where there is no need to prevent confusion between the advocacy and advocate roles. The "at a trial" wording which the Commission ignored in Order 7084i, is part of Rule 3.7. I briefed that trial vs. hearing distinction prior to the issuance of Order No. 7084i, writing:

The relevant portion of Rule 3.7, Lawyer as Witness, provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

Some cases, like *Heard v. Foxshire Assocs., LLC*, 806 A.2d 348 (Md. Ct. Spec.App. 2002), hold that ethics rules distinguish between "trial" and "hearing" and thus do not prohibit lawyers from giving evidence on behalf of clients before administrative agencies. Montana's Administrative Procedure Act, references this proceeding as a "hearing." See MCA § 1.3.219 which begins "(1) The **contested case hearing** shall be conducted before the decision making authority of the agency or a hearing officer" [Emphasis added]

The Maryland's Rules, Appendix, Rules of Professional Conduct, Rule 3.9 comment (2002) mirrors this view:

We conclude, therefore, that there exists a distinction between a "trial" and a "hearing" in the applicability of the Rules of Professional Conduct. We further conclude that the MRPC does not preclude the giving of evidence by an attorney of record for a party before an administrative agency. However, we do not say that the evidence given by an attorney in those circumstances does not have to be under oath, or that it can be given by way of statement or narrative as an advocate, rather than as a sworn witness. It is imperative that evidence given before an adjudicatory body

1 be under oath, whether from an attorney or lay person, a lay witness or an
2 expert witness.
3

4 Thus, any statements by Complainants' attorney in bold would have to be
5 sworn before being considered as evidence rather than other narrative.

6 In *In re Leventhal*, 2012 WL 1067568 (Bkrtcy. N.D.Ill. March 22, 2012),
7 the court denied a motion to disqualify a lawyer who was also a witness
8 concluding: "Because the trial will be a bench trial, not a jury trial, there is no risk
9 whatever that the trier of fact will confuse the roles of advocate and witness." *Id.*
10 at *5; see also *United States v. Johnston*, 690 F.2d 638, 644 (7th Cir. 1982)
11 (advocate-witness rule is applied more flexibly in a bench trial); *Saline River*
12 *Prop., LLC v. Johnson Controls, Inc.*, No. 10-10507, 2011 WL 4916688 *3
13 (E.D.Mich. 2011).

14 In cases, like *In Re Leventhal, supra*, the court also denied a motion to
15 disqualify an attorney after evaluating the two tests that must be applied to
16 disqualify, and noting (at ¶ 2(a)) that "Under Rule 3.7(a)(3), an attorney may act
17 as an advocate at trial, even though he is likely to be a necessary witness, if his
18 disqualification 'would work substantial hardship on the client.' Model Rules of
19 Prof'l Conduct R. 3.7(a)(3) (2011)." So, even if the bolded comments and
20 argument of Complainants' attorney found along with attorney questions in the
21 pre-filed testimony were considered attorney testimony, disqualification of
22 Complainants' attorney would work a substantial hardship on Complainants. He
23 has represented Complainants on a pro bono basis in this case for more than four
24 years and as a former Minnesota Contract Administrative Law Judge hearing
25 complex utility rate cases, is familiar with the nuances of utility ratemaking. Thus,
26 requiring Complainants to find another pro bono Montana attorney conversant
27 with public utility law would work a substantial hardship on them.
28

29 Further, it was never made clear to me that I had to provide examples of other
30 lawyers who had testified before the Commission. In the request for a rule requiring LED
31 lighting, attorneys for involved utilities spoke at the roundtable. Also, the attorney for
32 NorthWestern is the only named legal person attesting to legal statements in responses to
33 Complainants' discovery. If the Commission's interpretation is to be continued, then
34 equal treatment would require NorthWestern to either strike its answers to discovery or
35 specify a legal witness to sponsor them.

36 **Q. It has been written by the hearing examiner that the Commission staff or**
37 **Consumer Council will provide any expert witness testimony needed on behalf of**
38 **Complainants. What is your response to that?**

39 A. Perhaps some of my testimony will elicit areas of investigation for staff and
40 Consumer Council witnesses.

41 The Commission's Hearing Examiner has expressed its view that Complainants'
42 witnesses may not provide expert testimony. That makes it necessary for me to step into
43 that capacity. Therefore, I am requesting permission to testify here because it would work
44 a hardship on Complainants to have to hire experts, and because experts of other
45 participants that the Commission believes will represent complainants have not to date

1 indicated that they will in fact be acting in what complainants perceive to be their
2 interest.
3

4 In ruling on the Rule 3.7 issue previously, the Commission's Hearing Examiner noted
5 that Complainants had not noted instances where attorneys had been allowed to testify in PSC
6 hearings. At that time, Complainant's did not realize it was their burden to point this out, so it
7 will be done now.

8 In PSC Docket D2009.1.2, attorney John Alke submitted comments (i.e., what amounts
9 to testimony) for Montana Dakota Utilities found at
10 <http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2009-1-6IN09031158616CM.pdf> in In
11 the Matter of the Petition For a Rulemaking to Require Adoption of Light Emitting Diode (LED)
12 Street Lights. That was a "roundtable" in lieu of a full-blown hearing. Mr. Alke's comments to
13 the Commission Roundtable addressing the issue cover lighting costs, and assurances that LED
14 technology was not yet proven even though he clearly did not have expertise in the area.

15 In that same docket, NorthWestern witness Schwartzenberger , was permitted to file
16 comments addressing Mont. Code Ann. §§7-12-4351 and 7-12-4354 (2007) even though he is
17 not an attorney (see page 5 of <http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2009-1-6IN09031158644O.pdf>).
18

19 Mr. Doty also filed comments in that proceeding while he was representing the Mayor of
20 Billings and the Dean of the University of Montana, College of Technology. See
21 http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D200916_IN_20090323_Motionreply.PD

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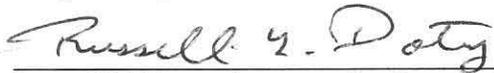
1 So there is precedent in proceedings before the PSC for attorney testimony (or comment
2 in lieu of testimony) as well as for comment on legal matters by non-attorneys (despite the
3 requirement that those practicing law before the PSC be admitted to the Montana Bar).

4 **CONCLUSION**

5 **Subject to any other motions to strike based on rules of evidence, Complainants'**
6 **motion to amend its testimony should be granted and Mr. Doty's testimony should be**
7 **included in the allowed testimony.**

8 Respectfully submitted.

May 4, 2015

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10 _____
11 Russell L Doty, Attorney for Complainants
12 Montana Attorney # 2472
13 3957 W. 6th St.
14 Greeley, CO 80634-1256
15 Phone: 406-696-2842
16 Email: iwin4u1@earthlink.net
17

CERTIFICATE OF SERVICE

I certify that pursuant to ARM 38.2.313, 38.2.1209 and the Procedural Order dated January 16, 2014, on May 4, 2015, an accurate copy of **Complainants' Reply to NorthWestern's Response to Complainants' Motion to Amend Testimony 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 XX E-mail:	Kate Whitney, Montana Public Service Commission 1701 Prospect Av, PO Box 202601, Helena, MT 59620-2601 Email: kwhitney@mt.gov
XX US Mail <input type="checkbox"/> Hand-delivery XX E-mail:	Laura Farkas, Montana Public Service Commission 1701 Prospect Av, PO Box 202601, Helena, MT 59620-2601 Email: lfarkas@mt.gov
XX US Mail <input type="checkbox"/> Federal Express XX 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 XX E-mail:	Sarah Norcott, Esq., Attorney for NorthWestern Energy 208 N Montana Ave., Suite 205, Helena, MT, 59601 Email: sarah.norcott@northwestern.com
<input type="checkbox"/> US Mail <input type="checkbox"/> Hand-delivery XX E-mail:	Leo & Jeanne Barsanti 3316 Pipestone Dr., Billings, MT 59102 Email: leoj47@msn.com
XX US Mail <input type="checkbox"/> Hand-delivery XX E-mail:	Tracy Lowney Killoy, NorthWestern Energy 40 E. Broadway, Butte, MT 59701-9394 Email: TRACY.KILLOY@northwestern.com
<input type="checkbox"/> US Mail <input type="checkbox"/> Hand-delivery XX E-mail:	Jim & Elizabeth Gruba 2527 Wyoming, Billings, MT 59102 jimbeth@gmail.com



Russell L. Doty