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

IN THE MATTER OF the Petition of James T. and)	
Elizabeth A. Gruba, and Leo G. and Jeanne R.)	REGULATORY DIVISION
Barsanti,)	
Complainants)	DOCKET NO. D2010.2.14
vs.)	
NorthWestern Energy,)	
Defendant)	

**NorthWestern Energy’s Motion to Compel Compliance with
Order No. 7084i**

NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”), by and through its undersigned counsel, moves the Montana Public Service Commission (“Commission”) for an order compelling Complainants to comply with Order No. 7084i. Specifically, NorthWestern requests, as required by Order No. 7084i, that the Commission require Complainants to strike testimony that is outside the scope of this docket and is improper expert opinion testimony from lay witnesses.¹

¹ NorthWestern does not address the Pre-filed Written Testimony of Russell Doty (“Doty Testimony”) in this Motion to Compel Compliance with Order No. 7084i (“Motion”). In NorthWestern’s Response to Complainants’ Motion for Leave to Amend filed on April 27, 2015, NorthWestern notes that it has not and will not determine whether the Doty Testimony contains improper expert opinion testimony until the Commission rules on Complainants’ Motion for Leave to Amend. That testimony will be addressed in a subsequent filing, if necessary.

Prior to filing this Motion, NorthWestern contacted Complainants in an attempt to resolve this issue. Unfortunately, a full resolution did not occur.²

Procedural Background

The following is the relevant procedural background for this specific issue. In March and April of 2014, Complainants filed the written testimony of seven witnesses. NorthWestern filed Motions to Strike portions of this testimony or, in one case, the entire document.³ On February 6, 2015, the Commission-appointed Hearing Examiner for this case, Ms. Laura Farkas, issued an *Order Granting NorthWestern Energy's Motion to Strike Testimony and Motion to Strike Testimony of Edward Smalley* ("Order No. 7084i" or "Order"). Specifically, Order No. 7084i, ¶ 39, held that

Complainants must refile their testimony in substantial compliance with the following guidelines:

- a. Testimony is to be focused on the sole issue in this case, whether or not the street lighting tariff is unreasonable or unjustly discriminatory[;]
- b. Testimony is not to contain any comments or dialogue of Complainants' attorney[;]
- c. Testimony is not to contain any 'attorney motions'; all motions must be made in separate filings[; and]
- d. Testimony is not to contain statements by lay witnesses offering expert witness testimony.

Paragraph 39 also provided a deadline for Complainants to refile their testimony consistent with Order No. 7084i.⁴ Complainants did not seek reconsideration of Order

² Complainants did agree to voluntarily strike some testimony; however, they did not agree to strike a majority of the testimony discussed in this Motion. For the reasons stated in this Motion, NorthWestern's disagrees with Complainants reasoning noted in their letter addressed to NorthWestern's counsel dated May 7, 2015 and served on all parties in this docket.

³ See *NorthWestern's Motion to Strike Testimony filed by Complainants and Request for an Extension* filed on April 1, 2014, and *NorthWestern's Motion to Strike Testimony of Edward Smalley and Request for an Extension* filed on April 17, 2014.

⁴ By Notice of Staff Action issued on February 24, 2015, the Commission granted Complainants additional time to refile their testimony. By agreement of all the parties, Complainants' deadline to refile testimony was again extended by one additional week.

No. 7084i as permitted by the Commission's administrative rules and the Notice of Commission Action issued on June 17, 2014. On March 27, 2015, Complainants refiled the testimony of all seven witnesses as well as new testimony from their attorney, Mr. Russell Doty. Concurrent with the re-filing of that testimony, Complainants filed a Motion for Leave to Amend. NorthWestern has responded to that motion in a separate pleading filed on April 27, 2015.

After the difficult task of reviewing the refiled testimony,⁵ excluding the Doty Testimony, NorthWestern determined that testimony from five of the seven witnesses only contains stricken testimony.⁶ However, two witnesses' testimony contains 40 pages of new testimony.⁷ This Motion addresses Complainants' failure to comply with Order No. 7084i by striking all testimony that discusses matters outside the scope of this docket and testimony from lay witnesses who provide expert opinion testimony.

Argument

Section 69-3-103(2)(c), MCA, provides the Commission with the power to "regulate the mode and manner of all investigations and hearings of public utilities and other parties before it." It "has discretion in choosing the means by which it will accomplish its functions." *Montana Power Co. v. Public Service Com'n*, 206 Mont. 359, 376, 671 P.2d 604, 613 (1983). In this

⁵ As is discussed in this Motion, Complainants failed to comply with the Commission's directive to delete and not add testimony. See Notice of Staff Action issued on February 24, 2015. Complainants have, in direct contravention of that directive, added testimony to several of the witnesses' testimonies. The task of comparing the original testimonies to the refiled testimonies was a huge task as Complainants did not simply add testimony, but rearranged the testimony.

⁶ NorthWestern notes that the testimonies of Ms. Natalie Meyer ("Meyer Testimony") and Mr. John Soderberg ("Soderberg Testimony"), besides preliminary identification information, addressed LED lighting only. In compliance with Order No. 7084i, the LED testimony has now been stricken. Given this fact, NorthWestern does not plan to ask these witnesses any discovery nor does it expect them to be witnesses at hearing as their testimony cannot be moved into the evidentiary record.

⁷ The Pre-filed Written Direct Testimony of Tom Towe ("Towe Testimony") as refiled contains 30 new pages of testimony. Originally, his testimony was 20 pages in length; it is now 50 pages. The Pre-filed Direct Written Testimony of Leo G. Barsanti ("Barsanti Testimony") as refiled contains 10 new pages of testimony. Originally, his testimony was 71 pages and is now 81 pages long.

docket, like most all other Commission dockets, the procedure for this contested case required the parties to file prefiled written testimony. Prefiled written testimony is permitted by the Montana Administrative Procedure Act (“MAPA”). *See* § 2-4-612(2), MCA (“When a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.”). Thus, before the Commission, in lieu of oral testimony at hearing, prefiled written testimony is permitted in order to expedite and efficiently handle complex utility proceedings. The Commission recognized this procedure in the current docket. *See* Order No. 7084i, ¶ 23.

At hearing, the Commission is governed by the “common law and statutory rules of evidence.” § 2-4-612(2), MCA. Since prefiled written testimony is testimony in lieu of oral testimony presented at hearing, the same rules of evidence must apply to prefiled written testimony. In this case, the Commission ordered Complainants to strike testimony concerning matters outside the scope of the docket and expert opinion testimony given by lay witnesses because the testimony violated a prior Commission order in this docket and several rules of evidence. *See* Order No. 7084i, ¶¶ 18-20, 28 and 36-37. As is discussed below in more detail, the Complainants have failed to comply with the Commission’s decision regarding what evidence must be stricken.

Montana Rule of Civil Procedure (“M. R. Civ. P.”) 16(f)(1) provides that

[o]n motion or on its own, the court **may issue any just orders**, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), **if a party or its attorney:**

- (A) fails to appear at a scheduling or other pretrial conference;
- (B) is substantially unprepared to participate – or does not participate in good faith – in the conference; or
- (C) **fails to obey a scheduling or other pretrial order.**

(Emphasis added). The Commission has not specifically adopted M. R. Civ. P. 16 in its administrative rules, but it should nonetheless be used as guidance by the Commission in deciding this matter. *Williamson v. Montana Public Service Com'n*, 2012 MT 32, fn 5, 364 Mont. 128, 272 P.3d 71 (quoting *Citizens Awareness Network v. Mont. Bd. of Env'tl. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583) (“Although the Montana Rules of Civil Procedure do not govern [Commission] proceedings, ‘they may still serve as guidance for the agency and the parties.’”). Given the powers specifically provided to the Commission to regulate the proceedings before it and looking to M. R. Civ. P. 16 as guidance in deciding this matter, the Commission should order Complainants to comply with Order No. 7084i, and if they fail to comply with that order, strike the referenced testimony in toto.

A. Complainants’ Failure to Strike Testimony Outside the Scope of this Docket: Only Testimony Regarding NorthWestern’s Street Lighting Ownership Charge is Permitted.

As the Commission noted in Paragraph 39(a), the only testimony permitted to remain in Complainants’ testimony was testimony regarding whether NorthWestern’s street lighting tariff is unjustly discriminatory and unreasonable.⁸ First, in compliance with that paragraph, Complainants have struck a majority of the LED lighting testimony originally filed in this docket.⁹ However, Complainants’ refiled testimony still contains several references to LED

⁸ The Barsanti Testimony, pages 47-49, also contains testimony concerning class actions. The Commission has yet to rule on Complainants’ Motion for Class Certification. If that motion is denied, the testimony just noted should also be stricken as outside the scope of the docket.

⁹ It should be noted that Complainants have also **added new testimony about LED lighting and then struck this new testimony**, evidently in some controverted compliance with Order No. 7084i. *See* the Barsanti Testimony, page 46, line 13 through page 47, line 17. As is discussed above in footnote 5, NorthWestern believes this is a direct contravention of the Commission’s prior directive that no new testimony be added. *See* Notice of Staff Action issued on February 24, 2015. Notwithstanding that fact, clearly, the Complainants should not be permitted to add new testimony regarding matters outside the scope of this docket and then strike the testimony to purportedly comply with Order No. 7084i.

lighting that should also be stricken. The following LED testimony should also be stricken by the Commission in compliance with Paragraph 39(a) of Order No. 7084i:

- Testimony of James T. Gruba (“Gruba Testimony”), page 23, lines 11 through 16;
- Gruba Testimony, page 25, lines 6 through 10;
- Barsanti Testimony, page 40, lines 6 through 8;¹⁰ and
- Barsanti Testimony, page 47, line 20 through page 48, line 13.

Additionally, Complainants have failed to strike other testimony that falls outside the scope of testimony permitted to remain by the Commission’s decision in Order No. 7084i, ¶ 39(a). Specifically, the Complainants have failed to strike testimony from Mr. Edward Smalley (“Smalley Testimony”). As noted in NorthWestern’s Motion to Strike Testimony of Edward Smalley (“Smalley Motion”), in addition to LED lighting testimony, the Smalley Testimony contained five questions and answers regarding Seattle City Light lighting rates. NorthWestern argued in the Smalley Motion that this testimony was not relevant to the only issue in this case: whether NorthWestern’s rates were unjustly discriminatory or unreasonable. *See* Smalley Motion, p. 3. The Smalley Motion requested that the entire testimony be stricken. *Id.*, p. 5. The Commission granted NorthWestern’s Smalley Motion. Despite that decision, Complainants have failed to strike the following testimony:

- Smalley Testimony, page 2, line 21 through page 3, line 18.¹¹

This testimony must be stricken by Complainants as required by Order No. 7084i.

¹⁰ NorthWestern requested that the testimony starting on page 40, line 6 through page 41, line 2 be stricken by Complainants. Complainants responded that it would strike the testimony starting on page 40, line 9 through page 41, line 2. It is NorthWestern’s opinion that lines 6 through 8 on page 40 must also be stricken.

¹¹ Similar to the situation noted above in footnote 6 with respect to the Meyer and Soderberg Testimonies, the Smalley Testimony, once the testimony noted above is properly stricken, will only contain preliminary background information about the witness. As such, NorthWestern does not plan to conduct discovery of this witness nor does it expect him to be a witness at hearing since his testimony is not permitted in the evidentiary record.

B. Complainants' Failure to Strike Expert Opinion Testimony from Lay Witnesses.

NorthWestern's Motion to Strike Complainants' Testimony ("Motion to Strike") asserted that the Meyer, Barsanti, Gruba, Towe, and Simon Testimonies improperly contained non-expert opinion testimony. *See* Motion to Strike, p. 5. The Commission agreed and found that Complainants' testimony "is not to contain statements by lay witnesses offering expert witness testimony." Order No. 7084i, ¶ 39(d). Complainants have failed to fully comply with this portion of the Order. NorthWestern still believes that the following testimonies improperly contain non-expert opinion testimony: Barsanti, Gruba, Towe, and Simon.¹²

With respect to the Gruba and Simon Testimonies, Complainants did not add any new testimony to these documents. Complainants failed to provide qualifications necessary to show that these individuals are experts in their respective fields thereby warranting expert opinion testimony. For example, Mr. Gruba testifies about lights in SILMD 162 and how they must be post top because "they are mounted too high." Besides the irrelevancy of this information, Mr. Gruba is not qualified to give an opinion on this matter. Gruba Testimony, page 4, line 22 through page 5, line 2. The Gruba Testimony also is loaded with speculation. *See, e.g.*, Gruba Testimony, pages 4, 5, 6, and 17. Additionally, much of the Gruba Testimony responds to questions about Complainants' Exhibit 2, which is embedded within the Gruba Testimony at page 8, and Exhibit 10. Exhibit 2 supposedly is derived from NorthWestern's responses to discovery requests as well as information from the Barsanti Testimony. As discussed below in more detail, the Barsanti Testimony still clearly contains inappropriate non-expert opinion testimony. In the Gruba Testimony, there are several questions that seek Mr. Gruba's opinion on the issue of amortization. *See* Gruba Testimony, page 10, lines 8 – 18; page 17, lines 11 – 22.

¹² As is noted in the Doty Testimony, Mr. Simon passed away last year. NorthWestern plans to address this matter in a separate pleading to be filed subsequent to a decision on Complainants' Motion for Leave to Amend.

This is inappropriate opinion testimony that the Commission has already said must be stricken.

The Commission should again order Complainants to strike this testimony.

Regarding the Simon Testimony, it also still contains non-expert opinion testimony. For example, the Simon Testimony contains opinions regarding amortization and what should be included on bills. NorthWestern believes the following is inappropriate expert opinion testimony that must be stricken from the Simon Testimony by the Complainants in compliance with Order No. 7084i:

- page 5, line 12 through page 6 line 2;
- page 7, lines 11 through 13;
- page 8, lines 13 and 15 through 17;
- page 9, lines 10 through 11;
- page 10, lines 15 through 16; and
- page 11, lines 1 through 13.

Both the Towe and Barsanti Testimonies directly attack the Commission's directive not to add information to their respective testimonies.¹³ The Towe Testimony provides two pages of legal argument regarding why the Complainants should be legally permitted to add new testimony. *See* pages 2-3 of the Towe Testimony. This matter has already been addressed by the Complainants in their Motion for Leave to Amend. Notwithstanding that fact, including "a legal conclusion or discussing the legal implications of evidence" in testimony has been found to be inadmissible evidence. *Sparton Corp. v. U.S.*, 77 Fed.Cl. 1, 7, 82 U.S.P.Q.2d 1666 (2007) (citing decisions from several circuits from the United States Courts of Appeal). Testimony should contain evidence, which is "[s]omething...that tends to prove or disprove the existence of an

¹³ Despite this directive, the Complainants added new testimony. The Commission has yet to rule on whether Complainants' are permitted to add such new testimony.

alleged fact.” Black’s Law Dictionary, 635 (9th ed. 2009). Thus, legal argument is not evidence.¹⁴ Legal arguments should be stricken from the testimony.¹⁵

The Towe Testimony also added minimal testimony to reflect Mr. Towe’s legal background and a certain piece of legislation that he sponsored when he was a Montana State Senator in the 1970s. *See* page 4 of the Towe Testimony. Sponsorship of a utility-focused bill does not make the sponsor an expert in utility ratemaking processes. Mr. Towe can appropriately testify about the legislation itself, but not matters concerning specific utility ratemaking because he does not have “knowledge of a science, art, or trade being superior to that of the mass of mankind.” *De Sandro v. Missoula Light & Water Co.*, 52 Mont. 333, 157 P. 641, 643 (1916). To be qualified as an expert, including an expert in utility ratemaking, “one [must be] engaged for a reasonable time in a particular profession, trade, or calling.” *Haynes v. Missoula County*, 163 Mont. 270, 289, 517 P.2d 370, 381 (1973) (citing *Nesbitt v. City of Butte*, 118 Mont. 84, 163 P.2d 251 (1945)). Mr. Towe’s qualifications fail to show that he has been engaged for a reasonable time in utility ratemaking processes to qualify him as an expert. It should be noted that the Commission has already found “Complainants are not qualified to provide testimony regarding the complexities of ratemaking.” Order No. 7084i, ¶ 33. None of the additional qualifications added to the Towe Testimony change that decision. Mr. Towe’s testimony regarding utility ratemaking matters must be stricken in compliance with Order No. 7084i. Specifically, the following should be stricken from the Towe Testimony:

¹⁴ There are several other places within the Towe Testimony where questions and answers were added regarding legal arguments/conclusions, which Complainants are masquerading as testimony. *See* pages 19-20, 25-29, and 31-34.

¹⁵ Complainants’ response to NorthWestern’s initial inquiry in this matter indicated that they would strike Mr. Towe’s legal conclusions if NorthWestern would stipulate that Mr. Towe’s conclusions were correct and NorthWestern’s legal responses were wrong. Complainants cited to an administrative rule permitting stipulation. It should be noted however that the rule cited, ARM 38.2.4203, permits stipulation as to facts, not legal arguments. NorthWestern maintains its position noted in this Motion that legal conclusions in testimony are improper. These matters are to be argued by the attorneys in briefing.

- page 13, lines 1 through 21;
- page 16, lines 16 through 22;
- page 20, line 12 through page 25, line 17; and
- page 30, line 1 through page 31, line 13.

As for the Barsanti Testimony, there was no testimony added regarding Mr. Barsanti's qualifications; however, most of the testimony concerning utility ratemaking and amortization remains in his testimony. The Barsanti Testimony adds testimony in what appears to be an attempt to justify retaining his non-expert testimony. He claims that the expert opinion testimony should be permitted to remain even though he admits he is not an expert because "I've done sufficient research to verify what I've observed." *See* Barsanti Testimony, pages 5, and 7-8 (He testifies that he is "vaguely familiar with utility rate bases and rates of return[,] that included general background gained over the years by reading about public utility rate raises in the news." He also "read some Montana law on public utilities.>"). The testimony claims that it "is not fair" that he cannot provide his opinions. *Id.*, page 7. Vague references to research to verify observations do not qualify one to be an expert. The fact that Mr. Barsanti feels that it is not fair is irrelevant to the fact that he is not qualified to provide an expert opinion. *See* the discussion above about qualifications necessary to give an expert opinion. Again, nonetheless, the Commission already ruled on this matter. Complainants, including Mr. Barsanti, are not qualified to give expert opinions in utility matters. The expert opinions in the Barsanti Testimony should be stricken in compliance with Order No. 7084i. Specifically, the following should be stricken from the Barsanti Testimony:

- page 9, line 21 through page 10, line 1;
- page 11, line 1 through page 18, line 2;

- page 22, lines 15 through 21;
- page 23, line 21 through page 25, line 8;
- page 27, line 5 through page 28, line 20;
- page 30, line 11 through page 32, line 13;
- page 35, line 10 through page 36, line 3;
- page 40, lines 6 through 16;
- page 41, line 11 through page 42, line 15;
- page 55, line 17 through page 56, line 2;
- page 56, lines 10 through 14;
- page 57, Exhibit 3, columns C, D, and E;
- page 58, line 20 through page 63, line 3;
- page 60, Exhibit 10, columns C, D, and E;
- page 65, lines 15 through 19;
- page 67, line 17 through page 68, line 13;
- page 70, line 20 through page 71, line 11;
- page 73, line 31 through page 74, line 22 (calls for legal conclusions); and
- page 76, lines 7 through 12.

Conclusion

Based on the foregoing, the Commission should order Complainants to comply with Order No. 7084i by striking the testimony noted in this Motion and provide that if Complainants fail to comply, the testimony will be stricken in its entirety.

Respectfully submitted this 8th day of May, 2015.

NORTHWESTERN ENERGY

By: 
Sarah Norcott
Attorney for NorthWestern Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Motion to Compel Compliance with Order No. 7084i in Docket No. D2010.2.14 has been hand delivered to the Montana Public Service Commission and the Montana Consumer Counsel this date. This will be e-filed on the PSC website and served on the most recent service list by mailing a copy thereof by first class mail, postage prepaid. This will also be emailed to appropriate parties per Procedural Order No. 7084h.

Date: May 8, 2015


Tracy Lowney Killoy
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