

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

IN THE MATTER OF the Complaint of)	
DR. PAUL WILLIAMSON, REV. DR. VERN)	UTILITY DIVISION
KLINGMAN, PATRICIA KLINGMAN &)	DOCKET NO. D2010.2.14
RUSSELL L. DOTY, on Behalf of Themselves)	
& Others Similarly Situated,)	ORDER NO. 7084
)	
Complainants,)	
)	
v.)	
)	
NORTHWESTERN ENERGY,)	
)	
Defendant.)	

**ORDER ON COMPLAINANTS' MOTION TO COMPEL ANSWER,
TO STRIKE DEFENSES & TO PREVENT FEES FOR RESPONDENT'S ATTORNEY
FROM BEING PAID BY CONSUMERS**

FINDINGS OF FACT

1. On February 11, 2010, the Montana Public Service Commission (Commission) received a formal complaint from Paul Williamson, Vern Klingman, Patricia Klingman, and Russell Doty (Complainants) against NorthWestern Energy (NWE). Complainants contend, among other things, that NWE's street lighting tariff ownership charges are excessive, unreasonable, and unjustly discriminatory.
2. On February 25, 2010, the Commission served its Notice of Complaint on NWE calling upon NWE to satisfy or answer the complaint in writing within twenty days of service (citing ARM 38.2.2101-38.2.2107).
3. On March 17, 2010, NWE filed its Answer to the formal complaint.
4. On March 22, 2010, NWE filed its Motion to Dismiss and Brief in Support.
5. On April 2, 2010, Complainants filed their Motions to Compel Answer, to Strike Defenses & to Prevent Fees for Respondent's Attorney from Being Paid by Consumers (Motions)

with an accompanying Affidavit and Brief in Support of Complainants' Motions. NWE's Motion to Dismiss (including Complainants' apparent attempt to designate its complaint as a class action) will be the subject of a separate Commission order; Complainants' request to amend its complaint (Motions, p. 4) will also be addressed in the Commission order addressing NWE's Motion to Dismiss; Complainants'/Petitioners' Motions (described immediately below) are the subject of this Commission Order.

6. Complainants' Motions seek the following relief from the Commission:

- (a) **To compel NWE to Answer Petition Paragraph Nos. I, III, IV, 22, 23, 49 & 50** on the basis that NWE's assertions that documents, tariffs, contracts, or Commission files "speak for themselves" is not a sufficient response in an Answer. Motions, p. 1;
- (b) **To strike what is alleged to be a false statement ¶ No. 22 of Respondent's Answer.** The statement reads: "Other items not included in the Commission approved ownership charge are operations and maintenance related to the street and area lights, which are rates approved by the Commission."
- (c) **To accept as fact various averments in the Petition.** Complainants assert that NWE has failed to respond adequately to Complaint/Petition ¶¶ V, 5, 6, 7, 8, 9, 10, 22, 58, 59, 60, 61, and 64 therefore, the paragraph averments should be construed as true.
- (d) **To strike all of Respondent's affirmative defenses.** Complainants assert that all of Respondent's affirmative defenses are "not well founded in law or fact," and "are imposed for an improper purpose, namely to delay and unnecessarily increase the costs of litigation in violation of Rule 11." Motions, pp. 2-3.
- (e) **To require that all NWE attorney's fees and litigation costs in this case are paid from stockholder and not ratepayer funds.** Complainants contend that such fees should be paid by shareholders because "ratepayers should not be required to fund litigation that is not in their interest." Motions, p. 3 of 5.

7. On April 14 2010, NWE filed its Reply Brief in Support of Motion to Dismiss and Brief in Opposition to Petitioners' Motions.

8. **Analysis/Rulings**

To compel NWE to Answer Specified Petition Paragraph Nos.

9. Complainants cite *McElhaney's Trial Notebook (4th Ed.)* (McElhaney's), which in turn purportedly cites *Poole v. Life & Cas. Ins. Co. of Tenn*, 47 Ala. App. 453, 256 So.2d 193 (1971) for the proposition that when referencing documents, tariffs, contracts, or Commission files, use of the phrase "speak for themselves or itself," does not constitute a sufficient response. Complainants' position is not further discussed in its accompanying affidavit and supporting brief.

10. NWE asserts that *McElhaney's* addresses evidentiary issues at trial and the best evidence rule, and how to get a witness to read portions of a document to the jury. NWE's Reply, p. 12. NWE contends that evidentiary issues at trial are "a far cry from answers to pleadings and are governed by different rules." *Id.*

11. The Commission agrees with NWE. The Alabama case cited by Complainants does not stand for the proposition that use of the phrase "speak for itself," when referencing a document is not sufficiently responsive in an Answer. Moreover, nowhere do Complainants attempt to cite any Montana precedent addressing use of the phrase.

12. Complainants failed to cite controlling or persuasive precedent supporting its assertion that NWE's Answers are not sufficiently responsive, therefore Complainants' Motion to compel NWE to Answer Paragraph Nos. I, III, IV, 22, 23, 49 & 50 should be denied.

To strike what is alleged to be a false statement in ¶ No. 22 of Respondent's Answer.

13. NWE's answering paragraph 22 states that "Other items not included in the Commission approved ownership charge are operations and maintenance related to the street and area lights, which are rates approved by the Commission." Complainants contend that this statement is false and simply states a contrary position, *viz:*

"For the time period in question in this proceeding, June of 2009 NWE billed street lighting districts for operation and maintenance charges separately from its ownership charge-\$0.56/month per light operations charge and \$0.54/month per light for maintenance charge." Motions, p. 2.

14. Complainants' position is not further addressed in its accompanying affidavit and supporting brief.

15. Complainants' assertions do not constitute proof of the conclusion asserted; that is a matter for Complainants to develop and prove at hearing. Complainants' Motion to strike a purported false statement at ¶ 22 in NWE's Answer should be denied.

To accept as fact various averments in the Petition

16. Complainants state that:

"As has been briefed, NorthWestern failed to respond adequately to the Petition by admitting fact that it knew or could have reasonably obtained information on." Motions, p. 2.

Complainants then proceed to argue that on the basis of its briefing, the Commission should "have the averments in Petition ¶s V, 5, 6, 7, 8, 9, 10, 22, 58, 59, 60, 61, and 64 admitted as fact." *Id.*

17. As regards the identified Petition paragraphs:

(a) Paragraph V contains a number of assertions. The paragraph contends that LED (light-emitting diode) technology has improved significantly since addressed by the Commission in a relatively recent proposed rulemaking. The paragraph also describes NWE's efforts as a "failure to afford its customers a product that would save them energy and money in many if not all cases...."

These are factual assertions and NWE's Answer states that NWE is without information or knowledge sufficient to form a belief as to the truth of the averments, therefore NWE denies the assertion. That is a sufficiently responsive Answer statement denying the assertions. Complainants must prove the assertions set forth in its Petition ¶ 5 at hearing and Respondents should be afforded an opportunity to contest the truth of the matters asserted.

(b) Paragraphs 5, 6, 7, 8, 9 and 10 of the Complaint/Petition are factual assertions of Complainants addressing such issues as the purported residential addresses of Complainants [Nos. 5, 7 and 9], that the Klingmans are "individual" customers of NWE and taxpayers in the City of Billings who are affected by local government taxes they pay levied in street lighting districts [No. 6], that the Klingmans and Mr. Doty are affected by taxes they pay levied on street lighting districts in the cities and counties in which they live and where some of the street lights are owned by Respondent-NWE [Nos. 6 and 10]; that Dr. Williamson, the former Dean of Technology at the University of

Montana does not bring this complaint in his official capacity, but as an individual customer of NWE and a person affected by local government taxes levied on street lighting districts in the city and county where he lives and works [No. 8].

NWE has, as regards each of the Petition/Complaint paragraphs identified, stated in its Answer that it is without sufficient knowledge or information sufficient to form a belief as to the truth of the averment therefore NWE denied each assertion.

Complainants set forth the unexceptional statement that honesty in pleading is required, but also that Respondents may be held to a duty to exert a reasonable effort to obtain knowledge of the facts in question. Brief on Motions, p. 15.

Again, with the exception of the assertions that the Klingmans and Dr. Williamson are customers of NWE, these are factual assertions that must be proven by Complainants through discovery or through evidence at hearing. NWE does, however, possess information that would easily verify or provide information upon which to base a denial or an acceptance of the "NWE customer" status of the Klingmans and Dr. Williamson, and NWE should have undertaken the simple task of determining whether these Complainants were NWE customers. NWE will be required to amend its Answer to ¶¶ 6 and 8 to properly address the question of whether the Klingmans and/or Dr. Williamson are NWE customers. This ruling does not, in any other way, require NWE to respond to other allegations contained within ¶¶ 6 and 8. Complainants' motion to deem the remaining allegations set forth in ¶¶ 5, 7, 9, and 10 as true should be denied. In addition, this issue may, or may not, have any bearing on the controverted issue of "standing" (to be addressed in a separate Commission order). Even if one or more of the Complainants are customers of NWE, it seems readily apparent that none of the complainants are street lighting customers of NWE and street lighting is the primary issue of this formal complaint.

(c) Paragraph 22 asserts that the Commission has approved NWE's Schedule NO. ELDS-1, Electric Lighting Delivery Service Tariff and has approved is [sic] predecessor rate schedules. Respondents may have a duty to exert a reasonable effort to obtain knowledge of the facts asserted, but Respondents are not obligated to make Complainants' case for them. There is a balance of interests involved in resolving such

issues. Moreover, the discovery process is the appropriate process to; for example, seek admissions or production of documents that will assist a party in proving allegations. Here, Complainants can identify the relevant "predecessor [street lighting] rate schedules" and establish that the Commission had approved such schedules through the discovery process. The allegations set forth in Complainants' ¶ 22 are not admitted as fact.

(d) Paragraphs 58, 59, 60, 61, and 64 involve Complainants' assertions that many cities are "well on their way to transitioning to LED street lighting (No. 58); that Ouray, Colorado, and Greenberg, Kansas have become all-LED cities (No. 59); that Los Angeles has embarked on a program to replace 140,000 of its street lights with LEDs within five years [No. 60]; that once bills for LEDs have been paid for, the lighting bills for a district will decrease by identified amounts [No. 63], and that adoption of new energy saving infrastructure technologies, such as LEDs can play an important role in helping the United States and Montana to become more energy independent and to generate less CO₂. Again, the Commission finds that these are allegations that, if Complainants wish to prove, should be developed through the discovery process and proven at hearing. The allegations set forth in ¶¶ 58, 59, 60, 61, and 64 are not admitted as fact.

To Strike all of Respondent's Affirmative Defenses

18. There is no evidence of record that Respondent's affirmative defenses "are not well founded in law or fact," or that such "are imposed for an improper purpose, namely to delay and unnecessarily increase the costs of litigation in violation of Rule 11." Motions, pp. 2-3.

19. NWE notes that Complainants have not provided the Commission with any legal authority upon which it may strike NWE's affirmative defenses, and that Complainants have shown no **facts** that would entitle them to judgment on NWE's affirmative defenses as a matter of law. NWE Reply, p. 11.

20. The Commission finds that Complainants' statements addressing Respondent's affirmative defenses are mere assertions that Complainants' must prove through discovery, testimony and/or through the briefing schedule. Moreover, Respondent must be afforded an

opportunity to refute Complainants' allegations; these are not assertions that can be readily proven at this early stage of litigation through analysis of the wording of Respondent's Answer.

To require that all NWE attorney's fees and litigation costs in this case are paid from stockholder and not ratepayer funds.

21. Complainants' ground for this request for relief is that "ratepayers should not be required to fund litigation that is not in their interest." Motions, p. 3 of 5.

22. The Commission finds that no legal precedent supporting Complainants' ground is provided to the Commission. Previous cases show that Complainants' stated ground does not control whether the Commission has authorized attorney's fees and litigation costs to be incorporated into rates; e.g., a request for a general rate increase is arguably a proceeding that is not in ratepayers interests, yet the Commission has authorized reasonable attorneys' fees and litigation costs to be incorporated into rates when they have been shown to be recurring in nature. The Commission finds that Complainants have not provided sufficient authority to warrant a finding that NWE attorney fees and litigation costs should be assigned to shareholders, not ratepayers. This is not to say that the issue will not be revisited should attorney fees and litigation costs associated with this complaint appear in a test year used by NWE to seek rate relief. Proper assignment of such costs may be analyzed at the time of such a rate increase filing.

Complainants' request for awarding of costs and attorney's fees

23. Complainants seek \$400 for costs and attorney's fees for "having to make this motion." Motions, p. 3.

24. Respondent contends that Complainants have provided no factual or legal authority supporting Complainants' request for relief and the Commission agrees with Respondent.

In Montana, attorney fees are allowable only when provided for by contract or statute. *Thornton v. Commissioner of the Department of Labor and Industry*, 190 Mont. 442 (1980), 621 P.2d 1062, 1980 Mont. LEXIS 911. See also, *Firefighters Local No. 8 v. City of Great Falls Fire Department*, 2004 ML 1550, 2004 Mont. Dist. LEXIS 2025. It is well settled in Montana that an administrative agency has only those powers specifically granted to it by the legislature. *Auto Parts of Bozeman v. Employment Rels. Div. Uninsured Employers' Fund*, 305 Mont. 40 (2001), 23 P.3d 193. This Commission has no statutory authority to award attorney fees or

litigation costs. The Commission is therefore without power to award attorney fees or litigation costs.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission has jurisdiction over this formal complaint through the provisions of the Montana Administrative Procedure Act (§§ 2-4-601 *et seq.*), Title 69, MCA, specifically §§ 69-3-321, 69-3-201, 69-3-301 and 69-3-304, MCA.

ORDER

1. Based on the Findings of Fact and Conclusions of Law set forth above, the Commission rules on the various Motions of Complainants as follows:

(a) Complainants' Motion to compel NWE to provide further answer to Complainants' Paragraph Nos. I, III, IV, 22, 23, 49 & 50 is DENIED.

(b) Complainants' Motion to strike a purported false statement in Paragraph No. 22 of Respondent's Answer is DENIED.

(c) Complainants' Motion to accept as fact the averments that the Complainants-Klingmans (Paragraph 6 of Complaint) and Complainant-Williamson (Paragraph 8 of Complaint) are customers of NWE is hereby SUSTAINED. NWE has in its possession information that should have allowed it to determine whether these Complainants are; in fact, its customers and NWE should have made efforts to determine whether this is the case before Answering that it was without sufficient information to form a belief as to the truth of the averment. NWE is ordered to file an amended Answer within 15 business days of the service date of this order to respond to the assertions that Complainants-Klingmans (§ 6) and Complainant-Williamson (§ 8) are NWE customers.

(d) Complainants' Motion to accept as fact the averments in its Petition Paragraph Nos. V, 5, 7, 9, 10, 22, 58, 59, 60, 61, 64 and all other averments in Paragraph Nos. 6 and 8 not referenced in Ordering Paragraph No. 1(c) immediately above are DENIED.

(e) Complainants' Motion to strike all of Respondent's affirmative defenses is DENIED.

(f) Complainants' Motion to require that all NWE attorney's fees and litigation costs in this proceeding be paid from stockholder and not ratepayer funds is DENIED, although this does not preclude further examination of the issue should NWE seek to incorporate such costs in a rate case filing before this Commission.

(g) Complainants' Motion requesting an award of costs and attorney's fees is DENIED.

DONE AND DATED this 11th day of May 2010, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GREG JERGESON, Chair

KEN TOOLE, Vice Chair

GAIL GUTSCHE, Commissioner

BRAD MOLNAR, Commissioner

JOHN VINCENT, Commissioner

ATTEST:

Verna Stewart
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten days. See 38.2.4806, ARM.