

Service Date: May 20, 2010

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

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

**ORDER ON NORTHWESTERN ENERGY'S MOTION TO DISMISS AND  
COMPLAINANTS' CLASS ACTION DESIGNATION AND MOTION TO  
AMEND COMPLAINT**

**FINDINGS OF FACT**

**Background**

1. On February 11, 2010, the Montana Public Service Commission (Commission) was in receipt of 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.

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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 (Complainants' Motions are addressed in a separate Commission order). Complainants also filed on April 2, 2010, an affidavit and brief in opposition to NWE's Motion to Dismiss.

6. NWE's Motion to Dismiss rests primarily on the following arguments: Complainants claims are barred by the doctrine of *res judicata* and collateral estoppels (Motion to Dismiss, pp. 11) and Complainants lack standing (*Id.*, p. 4).

**Res judicata and collateral estoppel**

7. NWE contends that the issues raised in this proceeding were previously raised in Docket N2009.4.45, a rulemaking proceeding addressing LED street lighting (LED Rulemaking). NWE cites both *res judicata* and collateral estoppels as grounds for barring Complainants' pursuit of their formal complaint filing.<sup>1</sup> Motion to Dismiss, p. 11. NWE states that *res judicata* prohibits re-litigation of a previously-litigated cause of action (citing *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 16) 331 Mont. 281, 130 P.3d 1267); collateral estoppels bars re-litigation of a previously-litigated issue (citing *McDaniel v. State*, 2009 MT 159, ¶ 28, 350 Mont. 422, ¶ 28, 208 P.3d 817, ¶ 28).

NWE contends that in the LED Rulemaking, the Commission:

"entertained numerous comments, held a roundtable, took input from stakeholders, and concluded that `After considering the comments received during the roundtable process, the Commission finds that LED technology shows great promise, but it is not sufficiently developed to justify enactment of a rule mandating that electric utilities convert their existing lighting to LED technology at this time. The Commission will, therefore, close this docket and conclude its consideration of adopting an LED street and area lighting rule. Order No. 6998, p. 3 ¶ 12." Motion to Dismiss, pp. 11-12.

8. NWE contends that Complainants' request for an interim rate decrease in this complaint proceeding "does not change the substantive nature of the request" arguing

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<sup>1</sup> The Commission has treated the filing as a formal complaint under § 69-3-321, MCA, therefore the Commission refers to the initial pleading as a complaint, not a petition.

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that the same issue/issues were addressed in the LED Rulemaking. *Id.* NWE also contends that the LED Rulemaking constitutes a prior "litigation" of the same issues and claims generated by the filing of the formal complaint citing *Baltrusch v Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267]. *Id.*

NWE states that *res judicata* applies if four factors exist:

"(1) the parties are the same; (2) the subject matter of the present and past actions is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them. [citing *Kullick v. Skyline Homeowners Assn., Inc.*, 2003 MT 137 ¶ 17, 316 Mont. 146 ¶ 17, 69 P.3d ¶ 17]" *Id.*, pp. 12-13.

9. The cited *Kullick* decision also sets forth standards for application of the doctrine of collateral estoppel:

"Collateral estoppel has three elements: (1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment on the merits was issued in the prior adjudication; and (3) the party against whom the plea is now asserted was a party or in privity with a party to the prior adjudication. [citing *Finstad v. W.R. Grace & Co.*, 2000 MT 228, at ¶ 28, 301 Mont. 240, ¶ 28, 8 P.3d 778, ¶ 18]"

10. NWE contends that all of the *res judicata* elements are present, but does not provide the Commission with an in-depth examination of the pleadings or issues examined in the LED Rulemaking decision, nor does NWE provide authority for the proposition that a rulemaking constitutes "adjudication" or that the Commission's Order No. 6998 is a "judgment."

11. Complainants contest the applicability of *res judicata* to their formal complaint. Complainants and NWE both cite the *Baltrusch* decision which held:

"*Res judicata*, or claim preclusion, bars the relitigation of a claim that the party has already had an opportunity to litigate. *Kullick*, ¶ 17. Collateral estoppel, or issue preclusion, bars the reopening of an issue that has been litigated and determined in a prior suit. *Holtman v. 4-G's Plumbing and Heating* (1993), 264 Mont. 432, 439, 872 P.2d 318, 322. We have indicated that *res judicata* will apply once a final judgment has been entered. *Holtman*, 164 Mont. At 436, 872 P.2d at 320; *Olson v. Daughenbaugh*, 2001 MT 284, ¶ 22, 307 Mont. 371, ¶ 22, 38 P.3d 154 ¶ 22; *see also State Med. Oxygen v. American Med. Oxygen* (1992), 256 Mont. 38, 43, 844 P.2d 100, 103 (indicating that 'a final judgment on the merits' is a prerequisite to application of *res judicata*); *Restatement (Second) of Judgments* § 13 (1981) ('the rules of *res judicata* are applicable only when a final judgment is rendered' but a lesser degree of finality is needed to apply issue

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preclusion); 18 A Charles Alan Wright et al., *Federal Practice and Procedure; Jurisdiction* 2d § 4434 at 128 (2002) (suggesting that although views of finality may be increasingly relaxed with respect to the doctrine of collateral stopped, similar developments may be inappropriate with respect to the doctrine of *res judicata*)." 2006 MT at ¶ 15.

12. Complainants assert that "no final judgment on the merits" has been issued in the LED Rulemaking and further contend that a dismissal of a rulemaking without prejudice do not constitute a final adjudication on the merits. Reply Brief, p. 2. Complainants provide no supporting case precedent for their contentions.

13. Complainants also maintain that case precedent supports the proposition that administrative agencies must be able, consistent with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances. Citing *Re Area Rate Proceeding for Permian Basin*, 390 U.S. 747, 88 S.Ct. 1344, 20 L. Ed. 312, 75 P.U.R.3d 257 (1968) and *United States v. Rock Island Motor Transport Co.*, 340 U.W. 419 (1951). Reply Brief, pp. 2-3.

14. Complainants also maintain that they did not have a full and complete opportunity to litigate the seminal issues in the LED Rulemaking indicating that the roundtable conducted did not afford Complainants extensive discovery on what was presented by opponents of the proposed rule and limited opportunity to ask questions of utilities' witnesses or attorneys. *Id.*, pp. 3-4.

15. The Complainants note that the Commission held in the LED Rulemaking that Montana utilities should monitor the technical and economic aspects of LED technology and will include consideration of such , along with other energy efficiency alternatives when the utilities develop and submit their resource planning filings. *Id.*, pp. 4-5. Thus, Complainants maintain that the Commission readily acknowledged the possibility of advancements in LED technology and Complainants contend that they will present evidence of such new developments at hearing on the merits. *Id.*, pp. 4-8.

16. Complainants contend that the issue of whether NWE allowed LED street lights on its utility-owned poles was never addressed in the LED Rulemaking, but has been raised in the formal complaint, therefore the required element of identity of issues is not present. *Id.*, pp. 8-9.

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17. Complainants maintain that while Dr. Williamson was a Petitioner in the LED Rulemaking, neither the Klingmans nor Russell Doty were parties in the rulemaking, thus there is no identity of parties present. *Id.*, p. 10.

**Ruling on *Res Judicata***

18. The Commission finds that the doctrines of *res judicata* and collateral estoppels are not applicable to the facts of this proceeding. While a party should not be able to relitigate a matter he/she has already had an opportunity to litigate, *res judicata* is not applicable when the previous case was an administrative proceeding that does not possess a judicial character.

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States v. Utah Construction and Mining Co.* (1966), 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L.Ed. 642, 661.

19. In this instance, the LED Rulemaking was of a legislative, not a judicial character. Participants in the LED Rulemaking did not have an opportunity for meaningful discovery on the other participants; the matter was not conducted as a contested case; participants were not allowed an opportunity for cross-examination of those submitting comments in the rulemaking; and the participants had no opportunity to brief issues. The rulemaking was simply not a full opportunity presented to Complainants to litigate their views. *See also, Nasi v. State Dept. of Highways*, 231 Mont. 395 (1988), 753 P.2d 327, 1988 Mont LEXIS 122. For this reason alone, the Commission does not find *res judicata* to be applicable. Moreover, a final decision of the Commission to not adopt an LED street lighting rule was not a final "judgment" against Complainants in the instant case for a judgment requires a proceeding with judicial characteristics. The doctrine of collateral estoppel does not, therefore, apply as the LED Rulemaking decision was not a final judgment on the merits.

20. In addition, the Commission finds that the current formal complaint is far broader than issues considered in the LED Rulemaking. The rulemaking focused on the technological development of LED street and area lighting; how efficient LED lighting was compared to other types such as high pressure sodium lighting, and whether LED lighting had become economically efficient to the degree to warrant adoption of a rule

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requiring or encouraging new street lighting and replacement lighting to use LED luminaires. The formal complaint does focus on the current stage of LED technology, but also specifically addresses NWE tariffs which include a monthly ownership charge for street lights not owned by a city or developers. Complainants' seek an interim rate decrease asserting that many of the poles, mast-arm, luminaires and wiring of NWE-owned street lights have been fully paid for, i.e., that NWE has recouped the full cost of many of these NWE assets and NWE customers should not be required to continue pay the ownership charge. NWE states that Complainants' rate decrease request is a "procedural ploy" (Motion to Dismiss, p. 12) but that is not correct; the interim rate decrease request is, in fact, a substantive issue. The Commission therefore finds that neither *res judicata* nor collateral estoppel apply because, as pleaded, there is no identity of issues between the LED Rulemaking and the formal complaint currently before the Commission.

### **Standing**

21. NWE contests Complainants' standing to bring this formal complaint.

"The question of standing addresses the litigant's right to have the merits of the dispute decided. *Helena Parents v. Lewis & Clark Cty.* (1996), 277 Mont. 367, 371, 922 P.2d 1140, 1142 (citing *Warth v. Seldin* (1975), 422 U.S. 490 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343). When standing is raised, the question is whether the person whose standing is challenged is a property party to request adjudication of a particular issue, and not whether the issue is justiciable. *Helena Parents, id.*, 922 P.2d at 2242 (citing *Flast v. Cohen* (1968), 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947). Motion to Dismiss, pp. 4-5.

22. NWE contends that the Montana Supreme Court has held that the following criteria must be met to establish standing:

"(1) the complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. *Fleenor v. Darby School Dist.*, 2006 MT 31, ¶ 9, 331 Mont. 124, ¶ 9, 128 P..3d 1048, ¶ 9, also *Helena Parents*, 922 P.2d at 1142-43, citing *Sanders v. Yellowstone County*, (1996), 276 Mont. 116, 119, 915 P.2d 196m 187l and also *Stewart v. Bd. Of Cty. Com'rs of Big Horn Cty.* (1977), 175 Mont. 197, 201, 573 P.2d 184, 186. *Id.*, p 5,

23. NWE maintains that Complainants' formal complaint reflects no direct interest and no specific harm to Complainants as distinguished from harm to the public

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generally. *Id.* NWE contends that Complainants-Klingmans and Williamson allege standing based upon their status as taxpayers and customers of NWE and Complainant-Doty alleges standing "based solely on his status as a taxpayer." *Id.*, p. 6.

24. NWE also anticipates a possible "representational standing" argument on the part of Complainants, i.e., that Complainants represent a larger group of persons or entities that have incurred and/or are incurring an actual injury. *Citing Associated Press, Inc. v. Montana Dept. of Revenue*, 2000 MT 160, ¶ 117, 300 Mont. 233, ¶ 117, 4 P.3d 5, ¶ 117 (Nelson, J., concurring), citing *Sierra Club v. Morton* (1972), 405 U.S. 727, 740-41, 92 S.Ct. 1361, 1369, 31 L.Ed.2d636. NWE maintains that Complainants have not shown that they have representational standing to bring the claims on behalf of other interested persons in the class on whose behalf this action is being brought and that the action must be dismissed. Motion to Dismiss, p. 9.

25. To the extent that Complainants seek to void provisions contained in contracts that NWE has with the City of Billings or other municipalities in Montana, NWE asserts that Complainants lack standing to bring such claims because Complainants are neither parties to, nor third party beneficiaries of such contracts. *Id.*, pp. 9-10.

26. Complainants (at pp. 17-18 of its Brief in Opposition) point out that the Commission has adopted a rule addressing formal complaints:

"(1) Complaints may be made by the commission on its own motion or by any person, having a legal interest in the subject matter, or any public utility concerned. Any public utility or other person likewise may complain of anything done or omitted to be done by the commission or any person over whom the commission has jurisdiction in violation of any law, rule, regulation or order administered or promulgated by the commission." ARM 38.2.2101.

27. Complainants maintain that their formal complaint alleges that:

"the jurisdictional utility failed to match its tariff with its depreciation schedule and that the Commission did not previously catch it, thus an overcharge was created." Brief in Opposition, p. 18.

28. Complainants rely on the Montana Administrative Procedure Act ("MAPA") to define "person:"

"(9) 'Person' means an individual, partnership, corporation, association, governmental subdivision, agency, or public organization of any character." § 2-4-102(9), MCA

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29. Complainants conclude that the provisions of MAPA are applicable to cases before the Commission, that the Commission is authorized to make such investigation as it may deem necessary upon a complaint filed by any person directly affected, and that Complainants are such persons. *Id.*, pp. 18-19.

30. Complainants also contend that Montana Supreme Court "rules" on standing are not applicable to this administrative proceeding. *Id.*, pp. 19-21. What are described at these pages of Complainants' Brief in Opposition are excerpts from a proposed decision in a Commissioner on Political Practices proceeding. The hearings officer ("HO") in that proceeding noted that the Montana Supreme Court has relied on the United States Supreme Court's standing interpretations. The HO held:

"Both courts recognize that standing is premised on two different doctrines: first, constitutional doctrines drawn from Article III of the United States Constitution, and second, discretionary doctrines intended to manage judicial review of legislative enactments. Citing *Druffel v. Board of Adjustment*, 339 Mont. 57, 168 P.3d 640, 643 (2007) and *Sierra Club v. Morton* 405 U.S. 727, 1972). *Id.*, p. 19.

31. Article III of the U.S. Constitution creates and authorizes the Federal Courts as a branch of the federal government and determines the jurisdiction of those courts. The judicial power of the federal courts' jurisdiction is limited to "cases" and "controversies" and courts have established "standing" standards to make certain that those bringing causes of action will, in fact, be bringing a case or controversy within the constitutional jurisdictional limits. The HO held that the Article III Constitutional requirements for standing are applicable only to judicial proceedings, not administrative proceedings. *Id.*, pp. 20-21. The thrust of this section of Complainants' Brief in Response is that standing standards for bringing causes of action in a court of law are not applicable to administrative proceedings; rather, the standing of those bringing a complaint to this Commission is to be determined by analysis of the relevant state statute (or statutes) to determine whether Complainants are within the scope of the statute/statutes. *Id.*, pp. 19-21.

32. Despite Complainants' argument that Article III interpretations addressing standing do not apply to administrative agency filings, Complainants proceed to cite cases initiated in courts as opposed to cases initiated with agencies; *viz.*, *Helena Parents Comm'n v. Lewis and Clark County Comm'rs.*, 277 Mont. 367, 922 P.2d 1140 (1996), *Lee*

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*v. State*, (1981), 195 Mont. 1, 635 P.2d 1282, *Grossman v. State*, (1984), 209 Mont. 427, 682 P.2d 1319, 41 St.Rep. 804, and *Gryzcan v. State of Montana*, (1997) 283 Mont. 433, 942 P.2d 112. See Brief in Opposition, pp. 22 & 23.

33. The Complainants contend that they are directly affected by NWE's street lighting rates; that NWE is overcharging through:

"...unconscionable contracts NWE imposes on the city of Billings and Missoula; by NWE's failure to offer LED lighting service not only in existing districts, but in future districts where Petitioners may wish to receive street lighting service; and by the contribution to global warming and CO2 emissions that NWE's failure to take reasonable measures to curb greenhouse gases causes as pled in Petition ¶ 92." *Id.*, p. 24.

34. In addition, Complainants cite Article II, §§ 3 and 34 of the Montana Constitution in support of their possessing standing to bring this formal complaint. *Id.*, pp. 24-25. Article II, § 3 provides as follows:

"All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

And, Article II, § 34 provides:

"The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

35. It is not clear from the pleadings what un-enumerated right or rights Complainants had in mind in citing Article II, § 34 of the Montana Constitution as supportive of their standing in this matter.

36. NWE's Reply to Complainants' Brief in Opposition contends that Complainants' arguments that they pay city taxes, that their tax bills are higher than they would otherwise be and that their property taxes pay for street lighting ignores the *Fleenor* requirement that they must have something more than status as a taxpayer in order to bring a challenge, i.e., they must allege a personal interest or injury beyond that common interest of all citizens and taxpayers. Reply, p. 3. NWE maintains that

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Complainants have not shown that NWE's Commission-approved rates results in "concrete adverseness" as to Complainants. *Id.*, p. 4.

37. Complainants apparently contend that their "special expertise in challenging state regulation" affords them standing; that "the statute," (§ 69-3-321, MCA--authorizing the filing of complaints with the Commission) is meant to allow persons with such expertise to challenge state regulation. Brief in Opposition, p. 25. NWE contests Complainants' assertions that Messrs. Doty and Williamson have special expertise to bring this action in their own behalf. NWE contends that there is no basis to conclude that Complainants are experts, that there is no basis to conclude that Complainants represent the interests of Montanans with respect to climate change, and that there is no basis to conclude that no one else in Montana is capable of litigating their own interests on the topic of climate change. NWE Reply, p. 4.

38. NWE contests the applicability of the *Helena Parents* (supra) case which was cited by Complainants in support of their standing arguments. NWE readily concedes that the decision holds that standing will not be denied simply because the harm being complained of affects people other than the plaintiffs, but contends that Complainants have no standing because they themselves have not been harmed. Reply, pp. 5-6.

39. NWE contends that Complainants have not alleged a constitutional or statutory violation, that Complainants have failed to show an interest in the subject that is any different than that of the public generally; therefore, their complaint must be dismissed. Reply, pp. 6-7.

40. NWE dismisses Complainants' citing the proposed decision in the *Mary Jo Fox v. Molnar* case before Montana's Commissioner on Political Practices, arguing that the hearing officer's proposed decision "is not persuasive authority and adds nothing to the Montana Supreme Court's analysis of the doctrine of standing." *Id.*, p. 7.

### **Ruling on Standing**

41. The Commission does agree with NWE (*see* FOF NO. 40 immediately above) to the extent that proposed decisions do not constitute persuasive precedent; however, the contents of the proposed decision, the cases cited and the analysis set forth in the *Fox v. Molnar* decision before the Montana Commissioner on Political Practices

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does raise legitimate issues as to whether the same standards to prove standing in causes of action initiated in federal or state courts are applicable to show standing in a case initiated before a state regulatory agency. As the Montana Supreme Court explained:

"The concept of standing arises from two different doctrines: (1) discretionary doctrines aimed at prudently managing judicial review of the legality of public acts, 13 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 3531 at 176; and (2) doctrines of constitutional limitation in the federal courts drawn from the 'cases and controversies' definition of federal judicial power in Article III, United States Constitution and in the Montana courts drawn from the 'cases at law and in equity' definition of state judicial power in Article VII, 1972 Montana Constitution." *Stewart v. Board of County Commissioners of Big Horn County* (1977) 175 Mont. 197, at p. 200, 573 P.2d 184, at p. 186.

42. Article III of the United States Constitution creates and authorizes the Federal Courts as a branch of the federal Government and determines the jurisdiction of those courts. Article VII of the Montana Constitution is also limited to the judiciary and describes the jurisdictions of the several Montana courts. Cases brought before courts in Montana must represent a "case" or "controversy" and the following minimum criteria are necessary to establish standing to bring such a cause of action: (1) the complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. *Id.*, 175 Mont. at p. 201573 P.2d at p. 186. *See also, Olson v. Dept. of Revenue*, (1986) 223 Mont. 464, at p. 469, 726 P.2d 1162, at p. 1166; *Helena Parents Commission v. Lewis and Clark County Commissioners*, (1996) 277 Mont. 367, at p. 371, 922 P.2d 1140, at pp. 1142-1143. These cases, however, involve causes of action initiated in a court of law, e.g., initiation of a lawsuit or a declaratory ruling. These should be distinguished from an action initiated before an administrative agency or, in some instances, a petition for judicial review from an administrative agency. Article III of the United States Constitution and Article VII of the Montana Constitution are not applicable to administrative agencies therefore the standing principles dictated by these constitutional provisions are not directly applicable to administrative agencies.

43. The overwhelming majority of cases cited by both NWE and Complainants, including those cited immediately above, are causes of action initiated

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before a court of law. *See also, Plan Helena, Inc. v. Helena Regional Airport Authority et al.*, 2010 MT 16, 355 Mont. 142, 226 P.3d 567; *Fleenor v. Darby School District*, 2006 MT 31, 331 Mont. 124, 128 P.3d 1048; *Gryczan v. State of Montana*, 283 Mont. 433, 942 P.2d 112, 1997 Mont. LEXIS 136; *Lohmeier v. Gallatin County*, 2006 MT 88, 332 Mont. 39, 135 P.3d 775; and *Chovanak v. Matthews*, 120 Mont. 520 (1948), 188 P.2d 582.

44. *Druffel v. Board of Adjustment*, 2007 MT 220, 339 Mont. 57, 168 P.3d 640, on the other hand, involved a petition for judicial review from an agency decision. The court's focus was therefore on the statute permitting judicial review and whether Petitioners were within the scope of the specific statute. The same situation, i.e., a specific statute describing what persons or entities could seek judicial review of a decision was present in *Swan Lakers v. Lake County Board of Commissioners*, 2007 Mont. Dist. LEXIS 750.

45. In this formal complaint, the Commission finds that the standing standards generated by Article III of the U.S. Constitution and Article VII of the Montana Constitution are not applicable to this administrative agency; rather, any authority conferred on Complainants to initiate a complaint had to be afforded by the Montana Legislature. The focus must be on the specific statute or statutes under which Complainants have made their filing and whether Complainants fall within the scope of the statute or statutes. Moreover, the analysis should be limited to allegations set forth in the initial filing of Complainants' and any explanations of that filing filed in Complainants' Brief in Opposition. The introduction of any new grounds in Complainants' Brief in Opposition should not be considered, for that would have required an amendment to the Complaint filed by Complainants. In other words, without a proper attempt to amend the complaint, Complainants must not be allowed to expand the scope of the initial filing through its Brief in Opposition.

46. In their initial filing with the Commission, Complainants' state:

"COME NOW YOUR PETITIONERS TO RESPECTFULLY REQUEST THE MONTANA PUBLIC SERVICE COMMISSION: Pursuant to MCA § 69-3-321 eliminate street lighting overcharges (and cross-subsidization of non-street lighting customers by street lighting customers) because Respondent's street lighting tariff ownership is excessive, unreasonable, and unjustly discriminatory (it costs certain Montana ratepayers more than \$180,000 a month);" Initial Complaint, p. 2. *See also Id.*, p. 6

47. Complainants seek a Commission order applicable to all street and area lighting districts where an ownership charge is applied, that would require NWE to install LED luminaires and to apply all ownership charges to defray the installation costs of such LED facilities. *Id.* Complainants further seek a Commission order that would require NWE to cease applying ownership charges when NWE's cost of installing LEDs in a lighting district plus an allowed rate of return on NWE's investment has been completely defrayed by NWE's applied ownership charges. *Id.*, p. 3.

48. Complainants also seek, "pursuant to MCA § 69-3-301," an order directing Respondent to include specified information in NWE's bills to all ELDS-1 customers. *Id.*, pp. 3 and 6.

49. Complainants further seek, "pursuant to MCA § 69-3-304" for "a temporary elimination" of an alleged ownership monthly overcharge in the amount of \$61,798 occurring in all Montana street lighting districts or other installations served by NWE. *Id.*, pp. 3, 7 and 22. Complainants further seek a refund for alleged overcharges "pursuant to MCA § 69-3-305. *Id.*, p. 5.

50. Further assertions made by Complainants in their initial filing that address the issue of standing include the following:

"88) **How the petitioners will be personally affected by the requested ruling:** Petitioners are deeply concerned about long term fiscal responsibility, energy independence, the environmental health of our planet, and our collective reluctance preventing us from achieving those goals." *Id.*, p 22.

51. On February 25, 2010, the Commission issued its Notice of Complaint and served the Notice on NWE. The Notice clearly indicates that the filing is designated a formal complaint filed under § 69-3-321, MCA. While the request for interim rate relief under § 69-3-304, MCA and for specified information to be included in NWE's bills to its customers under § 69-3-301, MCA are also cited in the initial filing, the matter is being processed as a formal complaint with the burden on Complaints under § 69-3-321, MCA.

52. Complainants address standing in their Brief in Opposition at p. 10 by stating:

**"Not taxpayer litigation.** This is not, as NWE contends, a suit governed by the taxpayer standing litigation surrounding constitutional challenges to the way a government is using its taxes. Petitioners are ratepayers damaged individually

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and collectively to varying degrees by rate overcharges and by the refusal of their utility to provide their city with energy efficient lighting. Petitioners just happen by circumstance to be required to pay the street light bill through local taxes. Petitioners are not challenging the payment of the bill by the cities. Petitioners are not challenging the city's right or a lighting district's right to spend taxes on street lighting. So this case is unlike the taxpayer cases NWE cites. Rather, as permitted by statute, Petitioners are challenging the utility's overcharge and profligate waste of energy."

53. The Commission disagrees with some aspects of Complainants' assertions. Complainants-Klingmans and Williamson may be ratepayers (Complainant-Doty is not a NWE customer), but they are not street lighting ratepayers. Section 69-3-306, MCA authorizes the Commission to establish "classifications of service." Pursuant to this statute, the Commission has approved a number of customer classes for NWE. The electric rates assessed each customer class vary and are based on general rate case cost of service studies that result in assignment of a revenue requirement for each customer class. Rates are then designed to generate sufficient monies to meet the class revenue requirement. Examples of some of the NWE-approved customer classes include residential (governed by Tariff Schedule REDS-1), General Service (small commercial—Tariff Schedule GSEDS-1), General Service Substation/Transmission (large commercial—Tariff Schedule GSEDS-2), Irrigation (Tariff Schedule ISEDS-1), and Qualifying Facility Power Purchase (Tariff Schedule QF-1). If Complainants-Williamson and the Klingsmans are NWE customers as asserted in the initial filing, they would be residential customers and their NWE bills would be governed by Tariff Schedule REDS-1, the tariff governing the provision of residential electric service. The street and area lighting customer class is governed by Tariff Schedule ELDS-1. NWE directly bills the members of this customer class, including the cities of Billings and Missoula, for the provision of street lighting service. The cities pay the street lighting bills to NWE. Thus, Complainants are not directly paying NWE for the provision of street lighting service in their respective cities of Billings and Missoula.

54. The pivotal statute under which Complainants have made their filing, § 69-3-321, MCA provides, in relevant part:

"(1) The commission shall proceed, with or without notice, to make such investigation as it may deem necessary upon a complaint made against any public

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utility by any ...; or by any person, firm, or corporation, provided such person, firm, or corporation is directly affected thereby, that:

(a) Any of the rates, tolls, charges, or schedules or any joint rate or rates are in any way unreasonable or unjustly discriminatory;..."

55. As is described in FOF No. 46 above, Complainants have alleged that NWE's street lighting charges are excessive, unreasonable and discriminatory. The analysis of the statute must then turn to whether Complainants are "directly affected." Arguably, because Complainants are not members of the street lighting class of customers, they are only "indirectly" affected by NWE's Tariff Schedule ELDS-1 rates.

56. Complainants also contend that they are third party beneficiaries under city-NWE street lighting contracts. Brief in Opposition, p. 11. NWE maintains that a party that is neither a party to a contract nor a third party beneficiary of the contract lacks standing to challenge the contract. While Montana public utilities do execute agreements with municipalities that address the provision of street lighting service, all such contracts are subject to the jurisdiction of the Commission. Moreover, no contract governs the rates or charges for the provision of such service. Section 69-3-301, MCA requires any and all such rates or charges to be filed with the Commission; these filed documents are the tariff schedules referenced in FOF 53 above. Utilities cannot change the rates in the filed schedules without Commission approval. § 69-3-302, MCA. Public utility deviation or departure from the Commission-approved schedules is prohibited by statute. § 69-3-305, MCA. The Commission therefore concludes that any NWE contracts with the cities of Billings or Missoula do not afford anyone as an alleged third party beneficiary of such contracts, standing to contest NWE street lighting rates for such contracts do not establish the rates and charges for the service.

57. Complainants maintain that the Klingmans and Russell Doty pay city taxes that are assessed as part of the property tax statement sent them from Yellowstone County and "included in those charges are the city's and county's prorate share of street lighting assessments in dozens of lighting districts throughout the city and county." Brief in Opposition, pp. 13-14. Clearly, customers within NWE's street and area lighting customer class, including the cities of Billings and Missoula and the counties of Yellowstone and Missoula, which are billed by NWE for street lighting service, would have standing to contest whether NWE rates for such service were reasonable, excessive

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or discriminatory. However, the Commission finds that Complainants have not shown that they are directly affected by NWE street lighting bills to the cities as is required by § 69-3-321, MCA. Complainants have not shown that they are directly harmed or affected by NWE billings to the cities. It has not been sufficiently explained how the cities generate monies to pay street lighting bills; whether Complainants themselves pay lighting district fees in a district with NWE-owned street lights; how the cities or counties calculate lighting district fees to districts where NWE owns the street lights as distinguished from districts in which the city or county owns the street lights; whether lighting district fees are the only source of revenues for the cities or counties to pay their street lighting bills; how the city or county calculates lighting fees in areas where there are no street lighting districts, but where there are street lights; why Complainant-Williamson would have standing as a renter, not a property owner or property tax paying or lighting district paying resident of Missoula.

58. Complainants also maintain that they have standing due to the Article II, § 3 Montana Constitution provision which affords Montanans the right to a clean and healthful environment. Brief in Opposition, p. 24. Complainants rely on 14 assertions set forth in ¶ 92 of their initial filing. Those assertions are the alleged results of the burning of fossil fuels, but nowhere do Complainants assert that NWE street lighting customers are served exclusively or partially through the burning of fossil fuels. This Commission is interested in reducing the burning of fossil fuels, but, as was found in Order No. N2009.4.45 of May 21, 2009, the Order closing the LED rulemaking, LED's are competitive in many situations, but they are not necessarily the best choice everywhere at their current stage of development. Less than one year ago, the Commission found that both NWE and Montana-Dakota Utilities Co. should include consideration of LED lighting technology along with other energy efficiency alternatives when the utilities develop and submit their resource planning filings. Order No. 6998, FOF No. 12.

59. The Commission concludes that Complainants are not members of street and area lighting class of NWE and Complainants have not shown that they are "directly affected" by NWE's Tariff Schedule ELDS-1 as is required by § 69-3-321, MCA.

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60. Having found that Complainants do not possess standing to initiate a formal complaint addressing NWE's street and area lighting rates, the Commission does not find it necessary to address the "class action" nature of the filing or Complainants' request to amend its filing.

### 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.

2. Complainants are not barred by *res judicata* or collateral estoppel from bringing this formal complaint.

3. Complainants do not possess standing to initiate a formal complaint addressing rates, charges and conditions of service in NWE's Tariff Schedule ELDS-1, the street and area lighting tariffs.

4. Formal Complaint in D2010.2.14 should be, and is hereby DISMISSED and the Docket is Closed.

### ORDER

The Formal Complaint in D2010.2.14 is hereby DISMISSED as Complainants do not possess standing to initiate and process the complaint against NWE's street and area lighting rates, terms and conditions of service.

Nothing in this order is intended to limit the ability of directly affected customers to file complaints on the just or reasonable nature of their public utility rates.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GREG JERGESON, Chair

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KEN TOOLE, Vice Chair

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GAIL GUTSCHE, Commissioner

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BRAD MOLNAR, Commissioner

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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.