

Service Date: July 27, 2010

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

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

**ORDER GRANTING IN PART AND DENYING IN PART
MOTION FOR RECONSIDERATION OF ORDER 7084a**

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.

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. On May 12, 2010, the Commission issued Order No.7084 addressing Complainants' Motion to Compel Answer, to Strike Defenses & to Prevent Fees for Respondent's Attorney from Being Paid by Consumers.

7. On May 20, 2010, the Commission issued Order No. 7084a addressing Respondent-NWE's Motion to Dismiss. Order No. 7084a dismissed the formal complaint on the basis of lack of standing of Complainants to bring the action. An errata to Order No. 7084a was issued on May 21, 2010.

8. On June 2, 2010, Complainants filed their Motion for Reconsideration of Order No. 7084a as well as an "Amended Complaint." These filings were postmarked June 1, 2010 (See FOF Nos. 9-11 below).

9. At its scheduled business meeting on June 15, 2010, Staff recommended, and the Commission accepted Staff's recommendation, to Deny Complainants' Motion for Reconsideration due to a failure to file the request within ten days after issuance of Order No. 7084a, the Commission order dismissing the complaint due to lack of standing of Complainants. Commission acceptance of Staff's recommendation resulted in issuance of Order No. 7084b denying reconsideration on the basis that the request was not timely filed.

10. Order No. 7084b overlooked an applicable provision of ARM 38.2.313, the Commission rule addressing computation of time, which provides in relevant part:

"(b) When a document is required to be filed or served on a particular day, the postmarking of the document on or before that day will satisfy this rule."

11. Complainants' Motion for Reconsideration was postmarked on the due date, *viz.*, June 1, 2010. The Motion for Reconsideration was, therefore, timely filed. On its own motion, the Commission reversed its findings in Order No. 7084b at its regularly-scheduled business meeting on June 15, 2010, through issuance of Order No. 7084c. Order No. 7084c also extended the time within which the Commission can consider Complainants' Motion for Reconsideration

on its merits to July 14, 2010. NWE filed a responsive pleading to Complainants' reconsideration request on June 14, 2010. Order No. 7084c held that Complainants should be afforded until June 24, 2010, within which to respond to the pleading if they choose to do so.

12. On June 25, 2010, Complainants filed their pleading responding to NWE's June 14, 2010, pleading which responded to Complainants' Motion for Reconsideration.

Analysis/Rulings

Reconsideration Standards

13. Reconsideration requests are governed by the provisions of ARM 38.2.4806 which provides in relevant part as follows:

"(1) Motion for reconsideration. Within ten days after an order or decision has been made by the commission, any party may apply for a reconsideration in respect to any matter determined therein. Such motion shall set forth specifically the ground or grounds on which the movant considers said order or decision to be unlawful, unjust or unreasonable." (emphasis added).

Reconsideration Request

14. Complainants correctly point out that the ordering paragraph of Order No. 7084a uses the term "customer" as follows:

"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." Order No. 7084a, p. 17.

The statute governing standing in this matter is § 69-3-321, MCA, which acknowledges standing to bring a complaint to any "person, firm, or corporation ... directly affected ..." The Commission will correct this mistake in this order to more accurately indicate what persons or entities have standing to bring a complaint against a Montana public utility to the Commission.

15. Complainants also cite (Mot. for Recon., p. 3) Commission rule ARM 38.2.601(1)(i) which defines "complaint" as follows:

"(i) 'Complaint' means a request for relief regarding anything done or omitted to be done by the commission or any person over whom it has jurisdiction in violation of any law, rule, regulation or order administered or promulgated by the commission, pertaining to matters over which it has jurisdiction."

Regardless of the scope or meaning of this administrative rule, it is the statute, *viz.*, § 69-3-321, MCA, which will govern standing in this matter (as was discussed in FOF Nos. 41-45 in Order No. 7084a), not a Commission rule defining "complaint."

16. Complainants assert that the Commission allowed the intervention of Blackfoot Telephone Cooperative and Three Rivers Telephone Cooperative persons in Docket No. D2006.10.143 (Mot. For Reconsid., p 3), but this is irrelevant as regards the issue before the Commission, as the issue of these two business entities' standing in Docket No. D2006.10.143 was not contested in that proceeding. If standing is a contested issue, the Commission's decision must be governed by the specific Montana statute describing those who have standing to initiate or to participate in the proceeding.

17. Complainants contend that the Commission's rule, ARM 38.2.2101 which describes who may complain to the Commission should afford Complainants standing in this matter (*Id.*, p. 7), but the Commission reiterates that the pivotal statute, § 69-3-321, MCA, or any relevant constitutional provisions govern the standing issue and, to the extent that the rule and statute, or the rule and constitutional provision conflict, the statute or applicable constitutional provision clearly governs. Complainants must explain how they have standing under Montana statutes or constitutional provisions in order for the Commission to reconsider its findings in Order No. 7084a.

18. Complainants describe the resulting hardship should the reconsideration relief be denied at pages 9 through 11 of their Motion for Reconsideration and asserts that this is relevant because "justiciability" (*sic*) often turns on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief. *Id.*, p. 9, citing *Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 156, 71 S. Ct. 624, 95 L. Ed. 817, 843-846 (1951). As was determined in Order No. 7084a (FOF Nos. 41-45), the analysis of standing in a court case is not applicable to the question of standing in a contested complaint case before the Commission. "Justiciability" as applied to Montana court cases, focuses on the Article III of the U.S. Constitution and Article VII of the Montana Constitution provisions requiring a matter to be a "case" or "controversy." These were found not to be applicable to standing questions in an administrative agency proceeding. Order No. 7084a, FOF Nos. 41-45. Hardship of denying

relief is an issue under justiciability analysis, but is not relevant to the lack of standing findings of Order No. 7084a.

19. Similarly, Complainants' allegations that local governments are unlikely to challenge NorthWestern's street lighting rates (Mot. For Reconsid., p. 9); that the Commission failed to use the power it has to initiate a separate proceeding to raise the issue of the just and reasonable nature of NWE's street lighting rates (*Id.*, p. 10); and that the assumed *prima facie* lawfulness of NWE's street lighting rates have been "exploded" by Complainants' pleadings (*Id.*, p. 11) has no bearing on whether Complainants have standing to bring the action. That was the central holding of Order No. 7084a and that is what Complainants must address in any appropriate reconsideration request.

20. Complainants further contend that:

"the fully allocated cost of service study allocation was flawed from the beginning because the utility can't even tell the average cost of a street lighting district, or when the lights were first operational." Mot. For Reconsid., p. 11.

This assertion has no bearing on the standing issue, i.e., it in no way tells the Commission how the dismissing of the Complaint due to lack of standing in Order No. 7084a was "unlawful, unjust or unreasonable," which is the standard that must be met as established in ARM 38.2.4806 in order to successfully move for reconsideration.

21. Complainants set forth the unremarkable contention that cross-subsidization is illegal, but then asserts that doing away with any cross-subsidization "... in itself gives complainants standing to ask the Commission to do away with the overcharge and any possible cross subsidization ..." (*Id.*, p. 12). Complainants discuss the alleged intra-class subsidization (some street lighting customers are allegedly subsidizing other street lighting customers) at pages 12-13 of their Motion, but these allegations do not address the analysis of Order No. 7084a finding a lack of standing to bring the complaint. In other words, Order No. 7084a determined that to bring a complaint, the complainant must be "directly" affected by the street lighting rates. The Commission determined that Complainants were not directly affected as is required by § 69-3-321, MCA, and assertions of intra-class street lighting subsidization does not address this shortcoming in Complainants' case.

22. The assertions that Dr. Williamson and Mr. Doty are experts (Mot. For Reconsid., p. 13) does not address the primary holdings of Order No. 7084a, i.e., that Complainants are not directly affected under § 69-3-321, MCA.

23. Complainants attempt to address the "directly affected" requirement of § 69-3-321, MCA, by asserting that the Commission's interpretation of the word "direct" is too narrow. Mot. For Reconsid., p. 5. Complainants cite the following statutes as more appropriate definitions of what is meant by "direct:"

- (a) Connoisseur license holders may import beer and wine from out-of-state, but only as a "legal, direct-shipment package to the license holder (§ 16-4-903, MCA);
- (b) A clinical laboratory or physician performing anatomic pathology services for a patient may present "direct billing" or demand for payment for services only to specified entities under § 37-2-315;
- (c) An insurer may request that all or any portion of any indemnities provided by a policy be paid directly to the hospital or person rendering such services under § 33-22-505, MCA;
- (d) "Direct" under § 33-12-102(22) means:

"'Direct' or 'directly', when used in connection with an obligation, means that the designated obligor is primarily liable on the instrument representing the obligation."

Three of these four examples are not analogous to Complainants' relationship with NWE. The medical statutory examples (22(b) and 22(c) above) involve billings for services rendered that are complicated by the presence of insurance policies and indemnification clauses therein which means that the patients receiving the services are not solely legally responsible to pay for the services rendered. The connoisseur license holder (22(a) above) is legally responsible for not only the costs of the beer and/or wine imported, but also for the shipping costs of the products. The Commission fails to see how the described interlining motor carrier service depicts property taxpayers' relationship to NWE as regards billings for street lighting services rendered. "Direct," as defined in § 33-12-102(22), MCA, (22(d) above) is analogous to the street lighting customers relationship to NWE for the provision of street lighting services. The members of the street lighting class are primarily and legally responsible for billings from NWE for the provision of street lighting services. The residents of the city or county are not primarily or legally

responsible to NWE for the provision of street lighting services; the residents are primarily and legally responsible to their respective cities or counties for taxes levied or street lighting district fees assessed. The Commission disagrees with Complainants conclusion that the taxpayer, renter or fee payer is primarily liable for a city or county street lighting bill (Mot. For Reconsid., p. 6), but does agree with Complainants' assertion that they may be "ultimately" (*Id.*) responsible. "Ultimately responsible" does not mean that persons so situated are directly affected. The Commission also disagrees with Complainants' portrayal at page 7 of their Motion for Reconsideration when it claims that there exists a statutory partnership in which the city pays the bills for the street light and thus performs the unreimbursed billing service for the utility. This does not accurately portray the legal obligations of the city residents; the city is legally liable to NWE for street lighting billings, not city residents.

24. Complainants assert that Order No. 7084a violates Montana Constitution's Article II, § 17 right to due process and the Article II, § 16 right to a remedy for wrong by taking "... away petitioners' right to defend their property, that is their taxes from unlawful, and discriminatory fees allocated to them." *Id.*, p. 4. Complainants' allegations are incorrect for this Commission does not set their property taxes, nor does this Commission establish street lighting fees for real property owners within the cities in which Complainants reside. Those governmental tasks are performed by the relevant municipal or county governments. Any due process violations or right to remedies for taking away Complainants' property due to taxes or fee assessments should be remedied by the appropriate municipal or county governmental authorities.

25. The Commission finds that Complainants' Motion for Reconsideration does not provide compelling or persuasive arguments showing that Complainants have standing to contest the NWE street lighting rates; Complainants are not directly affected which is required by § 69-3-321, MCA in order to bring such a complaint before the Commission.

Standing due to Article II, § 3 of Montana Constitution

26. Complainants also contend that Order No. 7084a's determination that Complainants lack standing to bring the complaint violates Montana Constitution's Article II, § 3 right to a clean and healthy environment. *Id.* Complainants contend that they have standing due to their fundamental right to a clean and healthy environment. The Complaint seeks replacement

of current, high-pressure sodium street lights with light-emitting diode (LED) street lights. Complainants assert that LED street lights would cut nighttime lighting energy by 15-70%. *Id.*, p. 18.

27. The right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at *Article II, Section 3 of Montana's Constitution*. This is a case of first impression before the Commission. Unlike, for example, the Montana Department of Environmental Quality, the primary statutes in which the Montana Legislature delegates authority to the Commission and proscribes the scope of the Commission's jurisdiction, relate to economic regulation of public utilities and, to a lesser degree, Montana motor carriers, not application or enforcement of environmentally-related statutes. The Commission also finds that there are few Montana cases providing guidance to this agency on determining standing when the Article II, Section 3 of the Montana Constitution's right to a clean and healthful environment is the asserted basis. In *Montana Environmental Information Center, et al. v. Dept. of Environmental Quality*,, 1999 Mt 248, 196 Mont. 207, 988 P.2d 1236 (1999), the Montana Supreme Court held that following test bears on 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." Citing *Gryczan v. State* (1997), 283 Mont. 433, 442-43, 942 P.2d 112, 118. 196 Mont. pp. 218-219.

Complainants allege that past, present, or threatened injury to their right to a clean and healthful environment has occurred in that they assert that LED street lighting consumes less energy than the currently-deployed high-pressure sodium vapor street lights. The Commission does not, however, perceive an injury that is distinguishable from the injury to the public generally. All Montanans appear to be similarly situated with regard to the consequences of high-pressure sodium vapor street lights' electricity consumption as compared to LED street lights' electricity consumption; i.e., all Montanans breath air that is effected by electricity generation—generation that is primarily located in Montana, which NWE owns or purchases to meet its load obligations. Moreover, the alleged reduction in street light consumption clearly would occur at night when electric load is met primarily through base load generating units as opposed to peaking units. There is no reason to assume that these base load units would be backed off due to less street

lighting consumption. First, base load generators are more difficult to back off than peaking generating units. Second, utilities, including NWE, would seek to sell night-time base load generation elsewhere in order to maximize the efficient use of a sunk resource. See also, *Lohmeier v. Gallatin County*, 2006 MT 88, 332 Mont. 39, 135 P.3d 775—(distinguishing the *Lohmeier* decision from both *Missoula City-County Air Pollution Control Bd. v. Bd. Of Env't. Review* (1997), 282 Mont. 255, 937 P.2d 463, and *Mont. Env'tl. Info. Ctr. v. Dept of Env'tl. Quality* (*infra*) on the basis that the two cited cases involved possible increases in the amount of pollution while *Lohmeier*, as is the case with this Complaint, does not allege increases in the amount of pollution, but possible decreases in existing pollution). The Commission finds that Complainants have failed to show that their request for relief would result in a cleaner and more healthful environment; and the Commission is not persuaded that Complainants have met the second prong of the standing test set forth in *Gryczan* and supported in the *Mont. Env'tl. Info. Ctr.* cited above as the asserted injury is indistinguishable from the alleged injury to the public generally.

28. Moreover, as described above, the Commission has determined that Complainants do not have standing to contest the rates, terms and conditions of NWE's street lighting tariffs because they are not "directly affected" as is required by § 69-3-321, MCA. Complainants' assertion of standing under Article II, Section 3's "clean and healthful environment" provision would require this Commission to ignore the provisions of § 69-3-321, MCA. In *Merlin Myers Revocable Trust v. Yellowstone County Commissioners*, 2002 MT 201, 311 Mont. 194, 53 P.3d 1268 (2002), the Yellowstone County Commissioners were faced with a statute, § 76-2-209, MCA, under which local planning boards could not prevent the operation of a gravel facility in a non-residential area. The County Commissioners denied a request to operate a gravel pit facility in a non-residential area because they determined that the gravel operation was not compatible with and would interfere with the surrounding property uses, and would violate the right to a clean and healthful environment to those people who lived and attended school nearby. The Supreme Court affirmed the District Court's holding that the County Commissioners, as an arm of the executive branch, were required to faithfully execute the laws of Montana and that by ignoring § 76-2-209, MCA, the Commissioners failed to do so. 53 P.3d, p. 1272. Similarly, this Commission must faithfully carry out the provisions of § 69-3-321, MCA, and finding that

Complainants have standing due to Article III, Section 2 of the Montana Constitution would mean that the Commission failed to follow the provisions of the Title 69 complaint statute.

Amendment to Complaint

29. Complainants filed an amendment to their formal complaint contemporaneously with their Motion to Reconsider Order No. 7084a. See FOF No. 8 above. Complainants contend that amendment is allowed as a matter of right because Commission Rule ARM 38.2.1207 allows amendments to any pleading or document prior to notice of hearing. Complainants June 25, 2010 Response to NWE Opposition to Reconsideration, p. 1. Complainants also cite Charles Alan Wright's Law of Federal Courts, 3rd Ed. 1976 (page 310) which addresses Rule 15(a) amendments in court proceedings with regard to adding or dropping parties or adding a counterclaim without obtaining court permission.

30. The Commission readily acknowledges that ARM 38.2.1207 allows amendments to any pleading or document prior to issuance of notice of hearing, but also finds that such rule is necessarily affected by the issuance of Order No. 7084a, an order that dismissed the cause of action. This is an issue of first impression before the Commission, but the Commission determines that once a complaint or an application has been dismissed, the only logical and appropriate remedy left for the complainant or applicant is to pursue one or more of the post-order remedies set forth in ARM 38.2.4805 (rehearing) or ARM 38.2.4806 (reconsideration). The dismissal of the formal complaint is akin to a judgment against complainants and the Commission finds that the better rule under such circumstances is that complainants no longer have a right to amend but retain a right to seek modification of the order dismissing the filing.

31. Even if the Commission authorized the amendment, the only significant modifications to the original complaint consisted of modifying certain dollar amounts from the original complaint and adding additional named complainants. Complainants aver that the newly-named Complainants are residential customers who are also property taxpayers assessed fees as members of a SILMD and "all of which have a small portion of their property taxes go to defraying the city's prorate share of street lighting costs." Complainants' June 25, 2010 Response to NWE's Opposition to Reconsideration, p. 3. The added complainants may very well pay street lighting district fees assessed by local city or county governments, but such circumstances do not present a persuasive, compelling reason to reconsider the Commission's findings that

Complainants do not possess standing to contest NWE's street lighting rates as they are not "directly" affected by NWE street lighting rates. See FOF Nos. 21, 23 and 25 above and Order No. 7084a.

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' Motion for Reconsideration as specifically regards 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 is DENIED as Complainants are not "directly affected" as is required by § 69-3-321, MCA.

3. Complainants' Motion for Reconsideration as specifically regards its asserted rights under Article II, §3 of the Montana Constitution to a clean and healthful environment is DENIED.

ORDER

Complainants' Motion for Reconsideration is DENIED in part and GRANTED IN PART.

Complainants' Motion for Reconsideration as specifically concerns the second Ordering Paragraph in Order No. 7084a is GRANTED. That Ordering Paragraph is amended to strike "customers" and insert "persons" and shall read as follows:

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

DONE AND DATED the 22nd day of July 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)