

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

IN THE MATTER OF the Complaint of	)	REGULATORY DIVISION
James T. and Elizabeth A. Gruba,	)	
Leo G. and Jeanne R. Barsanti, and	)	DOCKET NO. D2010.2.14
Michael W. and Frances E. Paterson	)	
on Behalf of Themselves and Others	)	ORDER NO. 7084i
Similarly Situated,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
NorthWestern Energy	)	
	)	
Respondent.	)	

**ORDER GRANTING NORTHWESTERN ENERGY’S MOTION TO STRIKE  
TESTIMONY AND MOTION TO STRIKE TESTIMONY OF EDWARD SMALLEY**

**INTRODUCTION**

1. In February 2010, Complainants’ predecessors filed with the Public Service Commission (Commission or PSC) an original Complaint against NorthWestern Energy (NorthWestern or NWE) challenging certain aspects of the operation of street lighting districts in Billings in particular, and Montana, in general, including the ownership charge contained within the electric lighting tariff and the absence of light emitting diode (LED) luminaires on street lights. The Commission dismissed the original Complaint for lack of standing, and Complainants’ predecessors filed for judicial review in the Thirteenth Judicial District Court, Yellowstone County. The district court affirmed the Commission’s dismissal, and Complainants’ predecessors appealed to the Montana Supreme Court. The Montana Supreme Court affirmed the Commission’s dismissal and remanded the matter back to the Commission to

consider a subsequently filed amended complaint. Now before the Commission for its consideration is Complainants' Second Amended Complaint.

2. On April 24, 2013, the Commission, through delegation to staff, issued *Procedural Order 7084e*, directing the parties to brief issues identified by Commission staff that relate to Complainants' Second Amended Complaint.

3. Subsequent to the issuance of *Order 7084e*, on May 13, 2013, Complainants filed a *Motion to Reconsider Procedural Order No. 7084e and Request for an Order to Show Cause*.

4. NorthWestern filed a response in opposition to the motion on July 1, 2013.

5. The parties fully briefed the issues and the Commission issued *Order 7084f* on September 25, 2013. In this order, the Commission dismissed Michael and Frances Paterson as Complainants in this matter, found that the claim alleging the ownership charge of the NorthWestern street lighting tariff as unreasonable or unjustly discriminatory as the sole claim in this matter, and directed Commission staff to make an investigation in to the ownership charge claim. All further claims were dismissed, and Complainants' *Motion to Reconsider Procedural Order No. 7084e and Request for an Order to Show Cause* as well as all other pending motions were denied.

6. The Commission issued a *Notice of Opportunity to Intervene in Complaint Proceedings* on September 25, 2013, setting an intervention deadline of October 25, 2013. On October 25, 2013, the Montana Consumer Counsel petitioned for intervention and was granted intervention on October 29, 2013. On January 16, 2014, the Commission issued *Procedural Order 7084g*.

7. On January 30, 2014, Complainants filed their *First Request for Admissions* (Discovery) and a request for *Subpoena Duces Tecum* (Subpoena). On February 4, 2014, NorthWestern filed its *Objection to Complainants' First Request for Admissions and First Interrogatories and Request for Production of Documents* and filed *Comments regarding the Complainants' Request for the Commission to Issue a Subpoena Duces Tecum*. In response, on February 10, 2014, Complainants filed their *Comments Regarding NorthWestern's objections to Discovery* and their *Comments Regarding NorthWestern's Comments Concerning the Subpoena Request*. On February 27, 2014, the Commission issued a *Notice of Commission Action* overruling NorthWestern's objections to Complainants' Discovery and directed NorthWestern to

file responses to the Discovery within 21 calendar days. The Commission further declined to issue a subpoena.

8. On March 3, 2014, Complainants filed a *Motion to Reconsider Denial of Subpoena of Edward Smalley*. On March 10, 2014, NorthWestern filed its *Motion for and Brief in Support of Reconsideration of the February 27, 2014 Notice of Commission Action*. On March 14, 2014, Complainants filed their *Objection to NorthWestern's Motion to Reconsider*. On March 20, 2014, the Commission issued a Notice of Commission Action denying Complainants' *Motion for Reconsideration* and granting NorthWestern's *Motion for Reconsideration*.

9. On March 21, 2014, Complainants filed the *Testimony of Bruce Simon, Thomas E. Towe, Leo G. Barsanti, James T. Gruba, Rev. John Soderberg, Natalie Meyer, and Exhibits of Street Lighting* (Complainants' Testimony). On April 1, 2014, NorthWestern filed a *Motion to Strike Testimony filed by Complainants and Request for an Extension* (Motion to Strike). On April 11, 2014, Complainants filed their *Reply Brief Opposing NorthWestern's Motion to Strike Testimony*. On April 30, 2014, NorthWestern filed its *Reply to Complainants' Opposition to Motion to Strike*.

10. On April 7, 2014, Complainants filed the *Testimony and Exhibits of Complainants' Witness Ed Smalley* (Smalley Testimony). On April 17, 2014, NorthWestern filed a *Motion to Strike Testimony of Edward Smalley and Request for an Extension* (Smalley Motion to Strike). On April 29, 2014, Complainants filed their *Brief Opposing NorthWestern's Motion to Strike Smalley Testimony*. On May 5, 2014, NorthWestern filed its *Reply to Complainants' Opposition Regarding the Motion to Strike Smalley Testimony*.

11. On April 14, 2014, Complainants filed a *Motion for a Temporary Rate Street Lighting Rate Reduction*. On May 19, 2014, NorthWestern filed its *Opposition to Complainants' Motion for a Temporary Rate Decrease*.

12. On April 21, 2014, Complainants filed a *Motion Asking the PSC to Require NorthWestern to Implement LED Street Lighting or to Reduce Tariff Energy Charge* and a *Motion for Class Certification*. NorthWestern filed its *Opposition to Complainants' Motion for Class Certification* on May 23, 2014, and on May 28, 2014, NorthWestern filed its *Opposition to Complainants' Motion Asking the Commission to Require LED Street Lighting or for a Reduction in the Tariff Energy Charge*. Complainants filed their reply regarding the motion for

temporary rate decrease on June 5, 2014, and their reply regarding class certification on June 11, 2014. Complainants filed their reply regarding the implementation of LED street lighting or to reduce the tariff energy charge on June 16, 2014.

13. On June 10, 2014, the Commission appointed Laura Farkas to act as hearings officer for the purpose of acting on protective orders, motions, and discovery issues.

### **DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW**

14. The above captioned action is a contested case proceeding subject to the provisions of the Montana Administrative Procedure Act. *See generally* Mont. Code Ann. §§ 2-4-601 to -631 (2013). The Commission is bound by common law and statutory rules of evidence. Mont. Code Ann. § 2-4-612(2).

15. The Commission has the authority and the discretion “to make such investigation as it may deem necessary upon a complaint made against any public utility...” Mont. Code Ann. § 69-3-321. The Commission is also authorized to “regulate the mode and manner of all investigations and hearings of public utilities and other parties before it.” Mont. Code Ann. § 69-3-103(2)(c).

16. NorthWestern requests that the Commission strike portions of Complainants’ testimony because it, “contain[s] information outside the scope of this docket.” Mot. to Strike, p. 3 (April 1, 2014). NorthWestern also asserts that the Complainants’ testimony “is replete with irrelevant testimony, hearsay, improper attorney comments and statements, and opinion testimony filed by non-expert witnesses, all of which are inadmissible under the rules of evidence.” *Id.*

17. NorthWestern in a separate motion argues that the Smalley Testimony must be stricken because “it contains information outside the scope of this docket.” Smalley Mot. to Strike, p. 3 (April 17, 2014).

18. On September 25, 2013, the Commission issued Order No. 7084f, which stated in part: “The claim alleging the ownership charge of the NWE street lighting tariff is unreasonable or unjustly discriminatory is the sole claim which will proceed in this matter.” The Commission further held that “any and all other claims asserted or alleged in the Amended Complaint that do not relate to the ownership charge claim are dismissed.” Mot. at ¶ 20.

19. “Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probably than it would be without the evidence.” *State v. Redlich*, 2014 MT 55, ¶ 34, 74 Mont. 135, 321 P.3d 82, *see also* Mont. R. Evid. 401. Relevant evidence is generally admissible, while irrelevant evidence is not. Mont. R. Evid. 402.

20. Relevant evidence may also be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues... or by consideration of... waste of time.” Mont. R. Evid. 403.

21. NorthWestern argues that “the Commission must strike portions of Complainants’ Testimony because they contain information outside the scope of this docket” and asserts that the filed testimony “attempts to expand the scope of this proceeding.” Mot. at p. 3. NorthWestern states that testimony regarding any matters “other than whether the ownership charge is unjust and unreasonably discriminatory is outside the scope of this docket” and is therefore irrelevant. *Id.*

22. Complainants argue that NorthWestern’s Motions should not be granted because the Complainants have a right to have their testimony remain in the administrative record as an offer of proof. Brief Opposing NWE’s Motion to Strike Testimony p.1 (April 8, 2014). Granting NorthWestern’s Motion will not cause Complainants’ Testimony to cease to exist. It has already been filed. It will remain in the administrative record.

23. A contested case proceeding before the Commission, an administrative agency, includes the use of pre-filed testimony. Rather than present live testimony at a hearing, witnesses pre-file written testimony, which opposing parties propound discovery upon. At the hearing, parties move pre-filed testimony into the evidentiary record. Authors of testimony are called to the stand to undergo cross examination based upon their testimony. In order for the docket to proceed in an efficient and expeditious manner, testimony and discovery must be limited to the issues at hand, as determined by the Commission.

24. Complainants appear to take issue with NorthWestern’s failure to identify with specificity which portions of their testimony ought to be stricken. The Commission finds this criticism reasonable; however, Complainants’ Testimony is exceptionally voluminous and confusing. Considerable portions of it meander far afield of the pertinent issue in this docket,

which the Commission made clear is the sole issue of whether or not the street lighting tariff is unreasonable or unjustly discriminatory. Order No. 7084f.

25. The task of wading through Complainants' Testimony and striking line by line the portions that are outside the scope and irrelevant would be excessively burdensome, and the Commission does not find it reasonable to saddle either NorthWestern or itself with such a task. Complainants' Testimony without a doubt contains portions that are applicable and relevant to the issue at hand. Yet these relevant and helpful portions are buried in long and irrelevant passages. It is arguably prejudicial to NorthWestern's defense in the sense that it is difficult to propound intelligent discovery on Complainants based on the testimony they have filed.

26. The Commission must weigh the principle of administrative efficiency against the Complainants' right to have meaningful access to the administrative process. Here, Complainants' Testimony has confused the issue, frustrated the Respondent's ability to promulgate discovery, and stalled this proceeding.

27. NorthWestern also argues that Complainants' Testimony "contains testimony from several individuals that are not experts, but nonetheless provide their opinion on matters such as ratemaking, loan amortization, street lighting design and materials, and Montana history." Mot. at p.5. NorthWestern identifies Mr. Simon, Mr. Towe, Ms. Meyer, Mr. Barsanti and Mr. Gruba. NorthWestern concludes that "the Commission must strike the portions of Complainants' Testimony that contain opinions of non-expert witnesses." *Id.*

28. The rules of evidence limit the scope of non-experts' opinion testimony. Mont. R. Evid. 701. If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. *Id.*

29. Lay witnesses may offer their opinions as long as those opinions are based on the witnesses' own observations. *State v. Smith*, 1998 MT 257, ¶ 17, 291 Mont. 236, 967 P.2d 424. Lay witnesses have been prevented from presenting "scientific economic testimony" in instances where there was no evidence of a witness' specialized skill as an economist. *Rocky Mt. Enters. v. Pierce Flooring*, 286 Mont. 282, 292, 951 P.2d 1326 (1997).

30. Complainants argue that they "cannot afford to hire an expert witness" but that "they do know how to talk about facts." Brief at p. 14. Complainants also argue that "to the

extent that [they] are experts concerning the matters they are testifying on, they are not disqualified from doing so” *Id.* at p. 15.

31. Complainants cite to a number of cases where the Court has allowed lay witnesses to testify as to the value of their own real or personal property. Brief at p. 14. In the case at hand, the value of real and personal property belonging to the Complainants is not at issue. If Complainants were ranchers in a condemnation proceeding, their musing regarding the value of their property would be permissible. However, Complainants cannot provide “scientific economic testimony” regarding ratemaking because they are not qualified to do so.

32. An inability to afford an expert witness does not serve as legal justification for lay witnesses substituting for experts. Complainants’ argument that they are “experts concerning the matters they are testifying on” is perplexing. Either the Complainants can be certified as experts or they cannot be. In this case, Complainants have not demonstrated any expertise in any subject matter relevant to this proceeding.

33. In compliance with the Rules of Evidence, Complainants may testify as to their opinions and inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness’ testimony. Mont. R. Evid. 701. Complainants are not qualified to provide testimony regarding the complexities of ratemaking, matters for which the Commission routinely requires expert opinion.

34. For example, in the Direct Testimony of Leo. G. Barsanti, Mr. Barsanti testifies that he has “analyzed” the lighting tariff, and answers questions about loan amortization. The foundation for Mr. Barsanti’s expertise in these matters appears to be that he is a homeowner and that his wife is an accountant. Test. Barsanti at p. 4. This testimony is more appropriately given by someone who possesses demonstrable technical expertise.

35. It is unnecessary for Complainants’ lay witnesses to provide scientific economic analysis; the Commission will undergo such analysis as necessary as part of its investigation.

36. NorthWestern also notes that Complainants’ Testimony “contains numerous motions, comments, and statements from Complainants’ attorney” and argues that “any comments, statements, or dialogue from an attorney in the proceeding is improper.” Mot. at p. 5. Rule 3.7 of the Montana Rules of Professional Conduct makes it clear that it is generally inappropriate for a lawyer acting as an advocate to testify. No examples have been provided of

an instance in which a lawyer representing a party before the Commission was permitted to testify in that same proceeding.

37. The Complainants' lawyer may not pepper Complainants' Testimony with various "attorney motions." The Commission has a longstanding practice of allowing attorneys to move testimony and exhibits into the evidentiary record at the time of the hearing, therefore it is unnecessary for Complainants' attorney to make such motions at present. Furthermore, any motions Complainants' attorney wishes to make should be made via standard motion practice, that is to say in separate and distinct documents. The Commission will not waste time and resources combing through Complainants' Testimony and plucking out the numerous motions scattered throughout seemingly at random.

38. NorthWestern also raises a hearsay objection. NorthWestern argues that Mr. Simon's written testimony and the Complainants' Exhibit No. 21 are hearsay and must be stricken. Mot. at p. 4. The Commission will defer ruling on this objection until such time as a hearing is held.

### **ORDER**

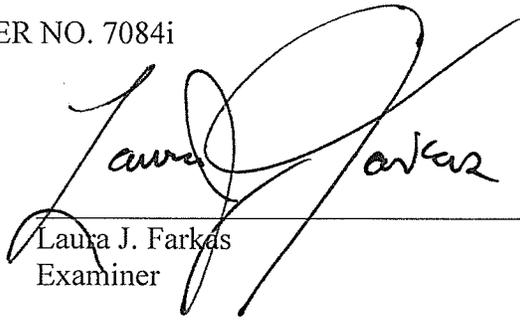
Based on the foregoing,

#### **IT IS HEREBY ORDERED THAT:**

39. 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. Order No. 7084f.
- 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.
- d. Testimony is not to contain statements by lay witnesses offering expert witness testimony.
- e. Complainants must refile their Testimony by Friday, February 27, 2015.

DONE AND DATED this 6th day of February, 2015.



Laura J. Farkas  
Examiner

ATTEST:



Aleisha Solem  
Commission Secretary  
(SEAL)

