

Service Date: February 13, 2015

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. 7084j
Similarly Situated,)	
)	
Complainants,)	
)	
v.)	
)	
NorthWestern Energy,)	
)	
Respondent.)	

**ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANTS’
MOTIONS TO COMPEL ANSWERS TO DISCOVERY**

Introduction

1. In February 2010, Complainants’ predecessors filed with the Public Service Commission (Commission) 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 March 3, 2014, Complainants filed their *Second set of Discovery to NorthWestern Energy Data Requests C-051 through C-074*. On March 31, 2014, NorthWestern filed its *Responses to Complainants' Second Set of Discovery Requests (051-074)*.

3. On April 7, 2014, Complainants filed a *Motion to Compel Responses to Discovery & Affidavit of Service*. On May 7, 2014, NorthWestern filed their *Response to Complainants' Motion to Compel Answers to Discovery*. Complainants filed their reply on May 27, 2014.

4. 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

5. The Commission is 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) (2013).

6. The Commission has adopted Rules 26, 28 through 37 (excepting rule 37(b)(1) and 37(b)(2)(d)) of the Montana Rules of Civil Procedure. Admin. R. Mont. 38.2.3301 (2015).

7. “Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense... The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Rule 26(b)(1) Mont. R. Civ. P.

8. “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Mont. R. Evid. 401.

9. “Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 50 written interrogatories, including all discrete subparts.” Rule 33(a)(1) Mont. R. Civ. Po.

10. Courts recognize a policy of broad and liberal discovery. *Patterson v. State*, 2002 MT 97, ¶ 15, 309 Mont. 381, 46 P.3d 642, (quoting *State ex rel. Burlington N. R.R. v. District Court*, 239 Mont. 207, 216, 779 P.2d 885 (1989)).

11. “The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential

to proper litigation.” *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 67, 337 Mont. 411, 162 P.3d 106 (quoting *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634).

12. The Supreme Court of Montana takes a dim view of discovery abuses. *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 68, 337 Mont. 411, 162 P.3d 106 (quoting *Drambrowski v. Champion Intern. Corp.*, 2000 MT 149, ¶ 34, 300 Mont. 76, 3 P.3d 617). The Supreme Court of Montana has stated that “dilatory abuse of discovery must no longer be dealt with leniently” and that “transgressors of discovery abuses should be punished rather than repeatedly encouraged to cooperate.” *Murphy Homes, Inc.* at ¶ 68.

13. The standard of review concerning a ruling on a discovery matter is abuse of discretion. *Hawkins v. Harney*, 2003 MT 58, ¶ 17, 314 Mont. 384, 66 P.3d 305 (quoting *McKamey v. State*, 268 Mont. 137, 885 P.2d 515 (1994)).

14. In Complainants’ Motion, Complainants move to compel NorthWestern to respond to all of Complainants’ second set of discovery. Mot. to Compel p. 1 (April 7, 2014). NorthWestern argues that the Commission should sustain its objections. Response p. 2 (May 7, 2014). The Commission finds as follows:

15. NorthWestern objects to requests for admission C-052 and C-053. Complainants have withdrawn their requests to have NorthWestern admit to C-052 and C-053. Therefore, NorthWestern’s objections are sustained. NorthWestern will not be compelled to answer C-052 and C-053.

16. NorthWestern objects to requests for admission C-054. Complainants have withdrawn their motion to compel an answer to C-054. Therefore, NorthWestern’s objection is sustained. NorthWestern will not be compelled to answer C-054.

17. NorthWestern objects to interrogatories C-060 and C-061. Complainants asked questions seeking clarification of NorthWestern’s billing practices. Mot. at p. 5. NorthWestern objects to these interrogatories arguing that they seek irrelevant information because they inquire into components of the lighting tariff other than the ownership charge. Response at p. 7. Complainants argue that answers to C-060 and C-061 are relevant to determine what component of operating and rate base amortization are not covered by the ownership charge. Mot. at p.5. Complainants also point out that the billing charge is mentioned in the testimony of a NorthWestern witness. Reply p. 5 (May 27, 2014).

18. NorthWestern may be correct that ultimately the responses to interrogatories C-060 and C-061 may be deemed irrelevant, and NorthWestern is welcome to make that argument when it comes time to move certain discovery into the evidentiary record. At present however, Complainants interrogatories appear reasonably calculated to lead to discoverable evidence by providing a complete picture of NorthWestern's billing practices, which may be relevant to the ownership charge. In keeping with a policy of broad and liberal discovery, NorthWestern's objections to C-060 and C-061 are overruled, and NorthWestern is hereby compelled to answer.

19. NorthWestern objects to interrogatories C-062, C-063, and C-073, arguing that the questions seek irrelevant information because they ask for original costs of street lights in certain districts, costs which were incurred before the establishment of the ownership charge in 1997. Response at p. 8. Complainants argue that whatever tariff or tariff component existed prior to 1997 should be considered the predecessor to the current tariff. Mot. at p. 8. Complainants argue that there is no way to verify that what happened prior to 1997 has not influenced the current tariff. Reply at p. 6. The Commission agrees. NorthWestern's objections are overruled, and NorthWestern is compelled to answer.

20. Complainants request that the Commission compel NorthWestern to answer interrogatory C-065. NorthWestern did not object to this interrogatory, and provided an answer, indicating that the question was based upon incorrect information. Response at p. 9. Complainants argue that this response is "incomplete and evasive." Reply at p. 10. Both parties in this case are represented by attorneys. While the Commission would grant some leeway to a *pro se* litigant, the Commission expects attorneys to employ care in formulating their discovery requests. The Commission expects attorneys to be able to formulate discovery requests that are not overly broad and are clear as to what information the asker is seeking. This standard ensures efficiency. Interrogatory C-065 has been asked and answered. Complainants request to compel is denied.

21. NorthWestern objects to interrogatory C-066. NorthWestern argues that the manner in which account numbers are determined and what they mean or if they even have meanings is not relevant to this proceeding. Response at p. 9. Complainants argue that they were informed that NorthWestern could not produce certain information without knowing account numbers. Mot. at p. 10. Complainants argue that without knowing how the numbering

system works one cannot determine when accounts were created, which would provide information about when NorthWestern began depreciating lights. Reply at p. 11.

22. Complainants request seems reasonably calculated to lead to admissible evidence. When the accounts were created may be relevant to the ownership charge and how it is determined. If no relevant evidence is yielded, NorthWestern can object to this information's inclusion in the evidentiary record. NorthWestern does not have to provide specific account numbers, merely provide a general explanation of how account numbers are determined and what they represent, if anything. NorthWestern's objection is overruled, and NorthWestern is compelled to answer.

23. NorthWestern objects to interrogatory C-067. NorthWestern argues that Complainants are not entitled to information about all of NorthWestern's customers, as the Complainants in this docket live in Billings, Montana. Response at p. 10. NorthWestern is correct that the Commission's inquiry into this matter is limited to the Complainants who have been granted standing before the Commission, and limited to the lighting districts in which Complainants reside. Complainants' arguments in support of this request are terse and not persuasive. The Commission is unable to determine from Complainants' arguments why they are seeking this information, or how it is relevant. Therefore, NorthWestern's objection is sustained. NorthWestern will not be compelled to answer interrogatory C-067.

24. NorthWestern objects to interrogatories C-068 and C-069, arguing the requests seek irrelevant information because the information sought is in regard to street lights prior to the establishment of the ownership charge of 1997. Response at p. 10. Complainants argue that the interrogatories are precisely tailored to seek ownership charge information in the relevant lighting districts. Mot. at p. 13. The Commission finds that these requests could yield relevant information. NorthWestern's objections are overruled, and NorthWestern is compelled to answer C-068 and C-069, excepting subparts f. and g.

25. NorthWestern argues that it is not required to respond to C-069 and all following discovery requests, citing Rule 33(a)(1) of the Montana Rules of Civil Procedure which states that "unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 50 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2)."

26. It is clear in this instance that the parties have not stipulated to promulgating in excess of 50 interrogatories. Neither party sought leave from the Commission to disseminate excess interrogatories, and the Commission granted neither party such leave. Complainants argue that the interrogatories are also data requests. Mot. at p. 14. This is not the case. The discovery requests are labeled as interrogatories and are subject to the Montana Rules of Civil Procedure. They are not synonymous with data requests, which both parties will have the opportunity to propound further on in this proceeding, after the issuance of a Procedural Order.

27. Complainants, in their Motion to Compel, request that the Commission grant leave for the Complainants to serve in excess of 50 interrogatories to NorthWestern. Mot. at p. 14. NorthWestern argues that the request is “inappropriate” and that the request “should have been made prior to the requests being served and prior to the deadline...” The Commission agrees with NorthWestern.

28. “Moving” for leave to propound additional discovery in accordance with Montana Rules of Civil Procedure 26 and 33, in the midst of a Motion to Compel, following the dissemination of surplus interrogatories, is not proper. Such leave will not be granted. Complainants are reminded that such motions must be in distinct separate filings. All parties are expected to adhere to proper motion practice. Any such “motions” contained in Complainants Motion to Compel or Reply Brief will not be considered or acted on.

29. No party will be required to respond to surplus interrogatories, and moreover, the time for discovery permitted by Admin. R. Mont. 38.2.3301 has passed. Parties will be permitted to propound data requests during such time frames as expressly articulated and allowed by the Commission in a forthcoming Procedural Order.

30. At numerous times throughout their Motion to Compel Complainants ask for sanctions against NorthWestern. NorthWestern argues that Complainants “have failed to show that sanctions are warranted” and “disagrees that it has done anything unlawful as alleged by Complainants.” Response at p. 8. The Commission agrees. Any party has the right to object to any discovery propounded upon it in a timely fashion. Merely objecting to a discovery request does not warrant sanctions. Rule 37(b)(2)(A) of the Montana Rules of Civil Procedure lists a number of available sanctions for a party that fails to obey an order to provide or permit discovery. Complainants have failed to demonstrate that NorthWestern has failed to obey an

order by this Commission. Sanctions are premature at this time, and the Commission finds the Complainants' request for such undignified.

ORDER

Based on the foregoing,

IT IS HEREBY ORDERED THAT:

31. NorthWestern's objections to requests to admit C-052 and C-053 are hereby **SUSTAINED**.

32. NorthWestern's objection to request to admit C-054 is hereby **SUSTAINED**.

33. NorthWestern's objections to interrogatories C-060 and C-061 are hereby **OVERRULED**. Complainants' Motion to Compel regarding C-060 and C-061 is hereby **GRANTED**.

34. NorthWestern's objections to interrogatories C-062, C-063 and C-073 are hereby **OVERRULED**. Complainants' Motion to Compel regarding C-062, C-063, and C-073 is hereby **GRANTED**.

35. Complainants' Motion to Compel regarding interrogatory C-065 is hereby **DENIED**.

36. NorthWestern's objection to interrogatory C-066 is hereby **OVERRULED**. Complainants' Motion to Compel regarding C-066 is hereby **GRANTED**.

37. NorthWestern's objection to interrogatory C-067 is hereby **SUSTAINED**. Complainants' Motion to Compel regarding C-067 is hereby **DENIED**.

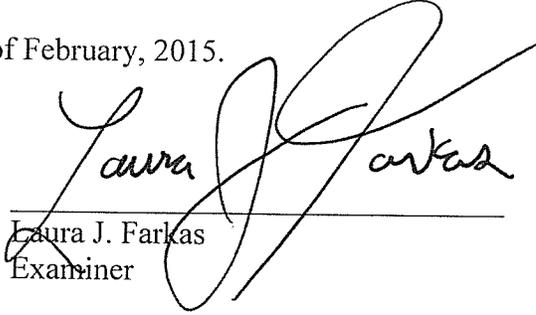
38. NorthWestern's objection to interrogatories C-068 and C-069 excluding C-069 subparts f. and g. is hereby **OVERRULED**. Complainants' Motion to Compel regarding C-068 and C-069 excluding C-069 subparts f. and g. is hereby **GRANTED**.

39. NorthWestern's objection to interrogatory C-069 subparts f. and g. is hereby **SUSTAINED**. Complainants' Motion to Compel regarding C-069 subparts f. and g. is hereby **DENIED**.

40. NorthWestern's objections to interrogatories C-070, C-071, C-072, and C-074 is hereby **SUSTAINED**. Complainants' Motion to Compel regarding C-070, C-071, C-072, and C-074 is hereby **DENIED**.

41. NorthWestern has 14 days from the service date of this order in which to comply.

DONE AND DATED this 13th day of February, 2015.



Laura J. Farkas
Examiner

ATTEST:


Aleisha Solem
Commission Secretary
(SEAL)

