

Service Date: February 25, 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. 7084k
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 April 7, 2014, Complainants filed their *Third set of Discovery to NorthWestern Energy* (third set of discovery). On May 2, 2014, NorthWestern filed responses to Complainants' third set of discovery.

3. On May 15, 2014, Complainants filed a *Motion requiring NorthWestern to Respond Adequately to Complainants' Third Set of Discovery or Face Sanctions* (Motion). On June 2, 2014, NorthWestern filed its *Response to Complainants' Motion to Compel Answers to Complainants' Third Set of Discovery*. On June 16, 2014, Complainants filed their reply.

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 “dilatatory 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 Complainants’ third set of discovery. Mot. at p. 1. NorthWestern argues that the Commission should sustain its objections and find that NorthWestern responded adequately to certain questions. Response at p. 2. The Commission finds as follows.

15. NorthWestern objects to Complainants’ request to admit C-057, arguing that the request seeks irrelevant information. Response at p. 3. Complainants assert that the information is needed “to foreclose argument on possible defenses NWE are expected to raise...” The Commission does not find this argument persuasive. However, Complainants also argue that they are seeking the information in order to compare the treatment of ownership charges with the treatment of operations and maintenance charges. The request is reasonably calculated to lead to discoverable evidence, and may assist in providing context and a complete picture when investigating the ownership charge. NorthWestern’s objection is overruled, and it is compelled to answer.

16. NorthWestern responded to interrogatories C-075, C-076, C-078, C-079, C-082, C-083, C-085, C-086, C-087, and C-088, stating that it was not required to respond due to the limitation on propounding more than 50 interrogatories found in Rule 33(a)(1) of the Montana Rules of Civil Procedure. Complainants and NorthWestern did not stipulate to the promulgation of excess interrogatories, nor did either party seek leave of the Commission to do so, until now.

Mot. at p. 3. The Commission never granted such leave, and the time for requesting such leave was prior to the propounding of additional interrogatories. Such leave will not be granted.

17. To get around this limitation, Complainants have simply begun labeling the interrogatories in their third set of discovery as “data requests” and insisting that there are no limits upon data requests. However, the Commission places parameters on the use of data requests in its Procedural Orders, much like a District Court controls discovery via a scheduling order.

18. The Commission allows the use of data requests during certain prescribed time frames. Both parties will have the opportunity to promulgate data requests upon one another at a future point in this docket, during specific time frames, determined by the Commission. NorthWestern will not be required to respond to any interrogatories in excess of the 50 allowed Complainants in Rule 33(a)(1). NorthWestern’s responses to the above listed interrogatories in paragraph 16 are deemed adequate, and NorthWestern will not be compelled to answer further.

19. Complainants assert that NorthWestern’s response to C-080 is incomplete, evasive, deceptive, and unlawful. Mot. at p. 10. NorthWestern objected to the request, but argues that notwithstanding the objection it “completely responded” to the request and that “there is nothing more to provide.” Response at p. 10. The Commission finds that NorthWestern provided exactly what was requested by Complainants. Complainants have failed to persuade the Commission that NorthWestern’s response was inadequate in any way. NorthWestern will not be compelled to answer further.

20. Complainants take issue with the format in which NorthWestern provided its response to C-081. Mot. at p. 11. NorthWestern admits to providing the information requested in a PDF rather than an Excel spreadsheet, as requested by Complainants. Response at p. 10-11. Complainants allege that they were forced to undergo “several hours of work to copy the data unto [sic] usable format in order to calculate the actual time it took to depreciate lights in various SILMDs.” Reply at p. 11. The Commission could have possibly ordered NorthWestern to provide the information in a more approachable format, however Complainants have rendered that option of no use, as they have converted the information themselves. There is no information to compel.

21. NorthWestern objects to C-089 on the basis that it is vague, overly broad, and burdensome. Response at p. 14. Initially, Complainants failed to include the years for which the

information is being sought. Complainants have now narrowed the scope of the request by providing specific years. Mot. at p. 12. Notwithstanding this clarification, NorthWestern still objects based on relevancy, alleging that information about street lighting accounts prior to 1997 are irrelevant. Response at p. 14. The Commission has thus far rejected this argument.

Information about street lighting prior to 1997 is permissible pursuant to a policy of broad and liberal discovery. Such information may lead to admissible evidence. If no admissible evidence is discovered, NorthWestern can argue at hearing to prevent discovery questions and responses from becoming part of the evidentiary record. NorthWestern is compelled to respond.

22. NorthWestern will not however, be required to provide information for all street lighting accounts. Complainants argue that “NWE’s claim that this case is limited to Billings Street Lights is not correct.” In fact, the Commission has limited this docket to the Complainants who were granted standing, and the lighting districts in which they reside. *See* Order No. 7084f (September 17, 2013).

23. NorthWestern responded to Complainants’ re-asking C-028, C-029, C-030, and C-034, by stating that the questions are still premature and referring to the Commission’s Notice of Commission Action issued on March 20, 2014. Response at p. 15. The Commission agrees. Complainants will have an opportunity to ask these questions via data requests later in the docket, in response to NorthWestern’s written testimony.

24. Throughout their Motion, Complainants request sanctions against NorthWestern, specifically in the form of attorney’s fees. 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. Merely objecting to a discovery request does not warrant sanctions. Complainants have failed to demonstrate that NorthWestern has disobeyed an order of this Commission or acted unlawfully.

25. Any additional “motions” contained within Complainants Motion will not be considered or acted upon. All motions must be made in separate and distinct documents, in accordance with proper motion practice.

ORDER

Based on the foregoing,

IT IS HEREBY ORDERED THAT:

26. NorthWestern's objection to request to admit C-057 is hereby **OVERRULED**. Complainants' Motion to Compel regarding C-057 is hereby **GRANTED**.

27. NorthWestern's objections to interrogatories C-075, C-076, C-078, C-079, C-082, C-083, and C-085-C-088 are hereby **SUSTAINED**. Complainants' Motion to Compel in regard to C-075, C-076, C-078, C-079, C-082, C-083, and C-085-C-088 is hereby **DENIED**.

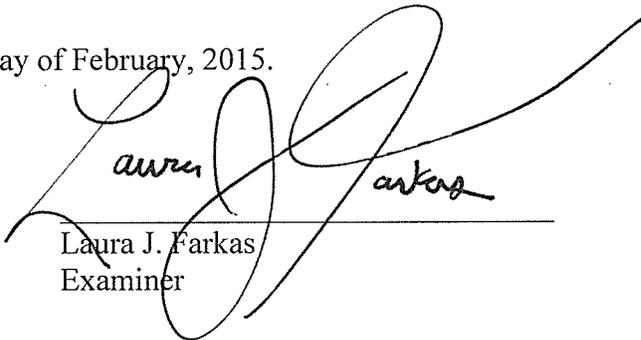
28. NorthWestern's objection to interrogatories C-080 and C-081 are hereby **SUSTAINED**. Complainants' Motion to Compel in regard to C-080 and C-081 is hereby **DENIED**.

29. NorthWestern's objection to request C-089 is **OVERRULED** as to street lighting accounts prior to 1997 and **SUSTAINED** as to all street lighting districts. NorthWestern must provide information from street lighting districts in which Complainants reside. Complainants' Motion to Compel regarding C-089 is **GRANTED IN PART**.

30. NorthWestern's objection to interrogatories C-028, C-029, C-030, C-034 is hereby **SUSTAINED**. Complainants' Motion to Compel regarding C-028, C-029, C-030, C-034 is hereby **DENIED**.

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

DONE AND DATED this 23rd day of February, 2015.



Laura J. Farkas
Examiner

ATTEST:



Aleisha Solem
Commission Secretary
(SEAL)