

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

ORDER DENYING PERMISSION TO AMEND

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 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.

3. On March 30, 2015, Complainants filed a *Motion for a Declaratory Ruling or Permission to Amend* seeking an interpretive ruling on a supposed ambiguity in Admin. R. Mont. 38.2.1207 (2015). Complainants seek to establish a right to amend pre-filed testimony based on the vacation of administrative hearing dates in the April 17, 2014 *Notice of Staff Action*.

4. Admin. R. Mont. 38.2.1207 reads, in relevant part:

Any pleading or document may be amended prior to notice of the hearing. After notice of a hearing is issued, motion for leave to amend any pleading or document may be filed with the commission and may be authorized in the discretion of the commission or the hearing examiner.

5. Complainants argue that since the April 17, 2014 *Notice of Staff Action* vacated all future hearing dates until such time as a *Second Amended Procedural Order* is issued, the initial clause of Admin. R. Mont. 38.2.1207 is again available to Complainants, and that they may amend their pre-filed testimony without authorization from the commission or hearing examiner.

6. Complainants seek a declaratory ruling and present the question of whether a petitioner has a right to amend under Admin. R. Mont. 38.2.1207 after notice of hearing is given and subsequently vacated.

7. In the alternative, Complainants seek leave to amend their pre-written testimony.

DISCUSSION

8. Complainants contend that they have a right to amend per Admin. R. Mont. 38.2.1207. Mot. for Decl. Ruling p. 3 (Mar. 30, 2015).

9. Admin. R. Mont. 38.2.1207 reads: “Any pleading or document may be amended prior to notice of the hearing.” The clarity of meaning that Complainants purport to see in this rule is perhaps misleading. In *Order 7084h* the Commission issued an amended procedural order that gave notice of hearing dates in this matter. Or. 7084h ¶13 (March 5, 2014). In the April 17, 2014 *Notice of Staff Action*, those hearing dates were suspended to give the Commission time to effectively deal with a large volume and quick pace of motion filings. The hearing is to be rescheduled for a more convenient future date. Thus, it may be argued, “notice of the hearing” was given pursuant to Admin. R. Mont. 38.2.1207. A simple suspension of the date of that

hearing does not retroactively alter the fact that the notice was given and that the deadline to amend the pre-filed testimony had passed. Ambiguity is present in the language of the rule. This position is supported by case law.

10. *Bitterroot River Protective Ass'n, Inc. v. Siebel* stands for the proposition that courts will grant deference to administrative decisions in a sort of state incorporation of the *Chevron Doctrine*. The court applies the stringent “clearly erroneous” standard of review to administrative decisions related to findings of fact. *Bitterroot River Protective Ass'n, Inc. v. Siebel*, 2005 MT 60, 21, 326 Mont. 241, 108 P.3d 518. The finding must be “clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record and whether the agency correctly applied the law.” *Id.* This is only somewhat related to the present matter, since deference under *Bitterroot* is only explicitly accorded to administrative findings of fact, rather than administrative interpretations of internal rules. *Id.* However, in conjunction with *Williamson, Fink*, and *Auer*, it serves to represent the trend of judicial deference to administrative decisions.

11. *Fink v. Williams* stands for the proposition that courts have “broad discretion” over trial administration issues including “a reasonable time limit on the time allowed to present evidence.” *Fink v. Williams*, 2012 MT 304, 18, 367 Mont. 431, 291 P.3d. While *Fink* is not directly on point, since it deals specifically with the discretion that district courts have over such issues, rather than administrative agencies, it suggests that agencies engaged in administering quasi-judicial procedures would command a similar scope of discretion over the process. “Reasonable time limits on the time allowed to present evidence” seems to cover Complainant’s desire to amend pre-filed testimony. In *Fink*, parties had been notified of the duration of the trial multiple times. *Id.* Nevertheless, Respondent Williams failed to allocate time “for her own critical testimony.” *Id.* The reviewing court found that this was a “strategic choice” and refused to find error in the district court. This logic seems to carry well to the present matter.

12. *Auer v. Robbins*, 519 U.S. 452 (1997), stands for the idea that while, as Complainants note in their Motion, “[a]n administrative agency must comply with its own administrative rules,” that same agency will be given deference with regard to its own interpretation of those rules. The Ninth Circuit case *Comm. For a Better Arvin v. United States EPA*, 786 F.3d 1169, 1175 (9th Cir. 2015), adopts the specific deference of *Auer*, finding that “EPA’s interpretation of its own regulations is given considerable deference and ‘must be given

controlling weight unless it is plainly erroneous or inconsistent with the regulation.” See also *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The Supreme Court of Montana has applied the deference articulated in *Auer*, stating:

[I]n determining whether an agency correctly interpreted its own rules, procedures, or policies, the agency's interpretation should be afforded great weight, and the reviewing court should defer to that interpretation unless it is plainly inconsistent with the spirit of the rule. The agency's interpretation of the rule will be sustained so long as it lies within the range of reasonable interpretation permitted by the wording.

Mayer v. Bd. of Psychologists, 2014 MT 85, ¶ 25, 374 Mont. 364, 321 P.3d 819 (quoting *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 595).

13. Given the ambiguity in the language of Admin. R. Mont. 38.2.1207 discussed above, the Commission is justified in interpreting the rule to disallow amendment during the suspension of a previously noticed hearing. Complainants do not have the right to amend testimony without seeking the permission of the Commission.

14. The Commission declines to issue a declaratory judgment on the meaning of Admin. R. Mont. 38.2.1207, preferring to deny leave to amend outright in the interest of economy and speed of process. To issue a declaratory judgment would be to calcify law where no such calcification is called for or necessary. Complainants' Motion will be treated as a Motion for Permission to Amend.

15. In the alternative, Complainants seek leave to amend their pre-filed testimony. Complainants reference the language of the administrative rule and the recent *Williamson* decision in support of their right to amend. *Williamson v. Mont. PSC*, 2012 MT 32. Complainants argue that, “the facts here are as similar to the facts in *Williamson* as to be indistinguishable.” Mot. at p. 3.

16. The facts in *Williamson* are not as on point as Complainants suggest. The *Williamson* court found that the commission may not disallow a petitioner to amend a complaint after the commission issued an order dismissing that complaint unless it is clear that no amendment would make that complaint viable. *Williamson* at 48. The court predicated this on an underlying policy of “[p]ermit[ting] amendments to the pleadings in order that litigants may have their causes submitted upon every meritorious consideration that may be open to them[.]” *Id.* at 51. The court then notes that this finding does not require those amendments to be granted; that discretion remains with the Commission. *Id.* In the present matter, however, Complainants

seek to amend pre-filed testimony, not a complaint or pleading. The facts also differ in the respect that, in the present matter, notice of hearing had been given and subsequently vacated. *Id.*

17. The Commission or hearing examiner retains the discretion to authorize or deny amendment under Admin. R. Mont. 38.2.1207 (2013) and the *Williamson* case cited by Complainants. *Williamson* at 51.

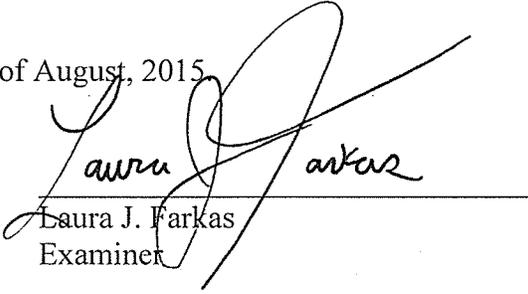
18. In light of the difference in facts in the present matter to *Williamson*, and in light of the glacial pace of the matter, and noting that Complainants will have the opportunity to file rebuttal testimony after Respondent files its testimony, to deny the motion to amend seems an allowable exception to the court's holding in *Williamson*. Complainants' ability to present testimony is not impinged upon in any way by denying leave to amend, given that testimony has already been filed, and given that Complainants will have further opportunity to present additional testimony. Complainant's *Motion for Leave to Amend* is denied in the interest of simple expediency and effectiveness of process.

ORDER

IT IS HEREBY ORDERED THAT:

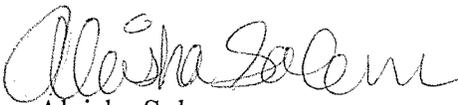
19. Complainants' *Motion for Leave to Amend* is DENIED.

DONE AND DATED this 7th day of August, 2015.



Laura J. Farkas
Examiner

ATTEST:


Aleisha Solem
Commission Secretary
(SEAL)