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

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PUBLIC SERVICE
COMMISSION

IN THE MATTER OF THE PETITION OF)	
JAMES T. AND ELIZABETH A. GRUBA;)	REGULATORY DIVISION
LEO G. AND JEANNE R. BARSANTI; &)	
MICHAEL W. AND FRANCES E.)	DOCKET NO. D2010.2.14
PATERSON, ON BEHALF OF)	
THEMSELVES & OTHERS SIMILARLY)	MOTION TO RECONSIDER
SITUATED,)	PROCEDURAL ORDER
)	NO. 7084e
VS.)	&
)	REQUEST FOR AN ORDER
NORTHWESTERN ENERGY,)	TO SHOW CAUSE
)	
<u>Defendant.</u>)	

MOTION TO RECONSIDER PROCEDURAL ORDER NO. 7084e

Pursuant to ARM 38.2.4806(1) and ¶ 2 of the Commission’s April 25, 2013, Procedural Order, Complainants respectfully move for reconsideration of Order NO. 7084e to correct incomplete and therefore inaccurate portions of paragraph 1 of that order, to add additional briefing requirements in paragraph 3, and to set a date for a show cause hearing on the motion for a temporary rate reduction and to allow Montana communities to use NorthWestern poles to house their own energy efficient street lighting luminaires.

BRIEF IN SUPPORT OF MOTION

Request to correct incomplete procedural history. Specifically, it is requested that paragraph 1 be amended to read (Throughout this brief, underlined portions are added to Order NO 7984e, and interlineated portions deleted):

In February 2010, Complainants’ predecessors filed with the Public Service Commission (Commission) an original Complaint against NorthWestern Energy

1 challenging certain aspects of the operation of street lighting districts in Billings,
2 in particular, and Montana in general, including alleged continued billing within a
3 Street Lighting & Improvement District (SILMD) of the ownership charge
4 contained within the electric lighting tariff beyond the time when the amount
5 collected under the ownership charge had completely defrayed the original cost
6 plus allowable rate of return on the street lighting infrastructure within an
7 SILMD; for a temporary rate reduction until the issue could be resolved; and the
8 alleged refusal of NorthWestern Energy to install more energy efficient absence
9 of light emitting diode (LED) luminaires on street lights, or to allow use of its
10 poles (most of which allegedly had been completely paid for by the ownership
11 charge) to be used by cities wishing to replace the inefficient luminaires supplied
12 by NorthWestern with more efficient ones. The Commission dismissed the
13 original Complaint, and on June 2, 2010, Complainants' predecessors moved to
14 amend their complaint adding the Grubas and Barsantis as co-petitioners and
15 seeking reconsideration. The Commission (July 22, 2010, Order 7084d) refused to
16 allow the amended complaint and denied the motion for reconsideration.
17 Whereupon, on August 23, 2010, the Complainant's predecessors, the Grubas and
18 the Barsantis filed for judicial review in the Thirteenth Judicial District Court,
19 Yellowstone County. The district court affirmed the Commission's actions
20 dismissal, and on July 7, 2011, Complainants' predecessors and the Grubas and
21 Barsantis appealed to the Montana Supreme Court. The Montana Supreme Court
22 affirmed the Commission's dismissal of the original four petitioners for lack of
23 standing, but ruled the amended complaint was proper under Commission rules
24 and that amended petitioners, Grubas and Barsantis, had standing and remanded
25 the matter back to the Commission. On May 8, 2012, the Commission authorized
26 "the complainants to amend their complaint to add additional parties as required
27 by the Montana Supreme Court's February 14, 2012 decision." ~~to consider a~~
28 ~~subsequently filed amended complaint.~~ Now before the Commission for its
29 consideration is Complainants' Second Amended Complaint and NorthWestern's
30 answer.

31
32 The Supreme Court was clear about how issues on appeal were decided. It held:

33 ¶2 There are two issues on appeal: (1) whether the four original complainants
34 have standing to pursue their complaint in the PSC under § 69-3-321, MCA,
35 and (2) whether the PSC properly rejected the amended complaint. As to the
36 first issue, we affirm the PSC's and the District Court's conclusions that the
37 original complainants lack standing. As to the second issue, we conclude that
38 the PSC's and the District Court's rationales for rejecting the amended
39 complaint were incorrect, and we accordingly reverse and remand for further
40 proceedings as detailed below.

41
42 The procedural history in this case on remand should reflect the clarity of the
43 Supreme Court's record.

1 **Request for additional briefing.** Complainants have been ordered to brief seven
2 issues (items 3a through 3g) with NorthWestern being afforded an opportunity to
3 respond. Complainants move that this briefing order be amended to require NorthWestern
4 to also brief certain issues with Complainants afforded an opportunity to respond. This
5 motion is made in the interest of fairness. That is, to be fair, NorthWestern should also be
6 required to brief seven prominent issues arising because of its insufficient or evasive
7 response to the complaint. Specifically, Complainants request that Order NO. 7084e be
8 amended by adding the following paragraphs requiring Northwestern to brief the
9 following:

10 3. The Commission orders briefing on the following issues:

11 ...

12 3h. Paragraph VI of the Complaint pled: “1) NorthWestern also will not allow
13 use of its poles so that communities with the inclination to switch to LEDs
14 cannot do so conveniently; and 2) Montana communities have not been
15 able to partner with the utility as has been done in hundreds of
16 communities in other states to utilize Economic Recovery Act money to
17 upgrade their municipal lighting while reducing energy budgets.”

18 NorthWestern responded: “At the beginning of the Complaint,
19 Complainants provide a "Summary of Petition." NorthWestern does not
20 believe a response to this section of the Complaint is required as
21 paragraphs I through XII are not allegations of fact, but an opening
22 statement of why the Complainants believe their Complaint is warranted.
23 To the extent that the Commission deems an answer to this section of the

1 Complaint necessary, NorthWestern is without sufficient knowledge to
2 admit or deny the statements made therein and therefore denies the same.”

3 In light of the US Supreme Court decision in *Ottertail Power*
4 *Company v. US*, 35 L.Ed.2d 359, 93 S.Ct. 1022, 410 U.S. 366 (1973) and
5 a lower court ruling in *Ottertail Power Co. v. FPC*, 536 F.2d 240 (1976)
6 and their progeny, on what basis does NorthWestern have authority to
7 deny Montana communities access to its poles, wires and other
8 infrastructure when the municipalities want to install LED street lights or
9 other luminaires? Assume that NorthWestern has been, is being, or will be
10 justly compensated for the use of those poles, wires and other
11 infrastructure and the luminaires to be replaced have been or will be fully
12 paid for by NorthWestern’s ownership or other tariff charge?

13 3i. Paragraph 25 of the Complaint pled “Montana law requires NorthWestern
14 to use the original cost depreciated method of calculating the value of
15 utility property placed into its utility rate base.”

16 NorthWestern’s answer to that statement was, “NorthWestern
17 states that the law speaks for itself.”

18 If NorthWestern believes that in “speaking for itself,” the law does
19 not require NorthWestern to use the original cost depreciated method of
20 calculating the value of utility property placed into its utility rate base,
21 what authority allows NorthWestern to use a different method for
22 calculating the value of utility property placed into its utility rate base?
23 Also, define any term necessary to answer this question in a way that is

1 consistent with the law and explain briefly. If NorthWestern fails to brief
2 this question, the ¶ 25 allegations will be deemed admitted.

3 3j. Paragraph 22 of the Complaint pled: “Pursuant to Montana law, no entity
4 is allowed to compete with Northwestern Energy in providing street
5 lighting service within its territory.”

6 NorthWestern’s answer to that statement was, “NorthWestern
7 states that the law speaks for itself.”

8 If NorthWestern believes that in “speaking for itself,” the law does
9 not prevent competition with Northwestern Energy in providing electricity
10 to electric street lights within its territory, pursuant to what authority can
11 entities other than NorthWestern provide electricity to electric street lights
12 within NorthWestern’s service area? Also, define any term necessary to
13 answer this question in a way that is consistent with the law and explain
14 briefly. If NorthWestern fails to brief this question, the ¶ 22 allegations
15 will be deemed admitted.

16 3k. Paragraph 26 of the Complaint pled: “A utility or other entity may not
17 avoid reasonable regulation by contract.”

18 NorthWestern’s answer to that statement was, “NorthWestern does
19 not believe a response to this paragraph of the Complaint is required as it
20 is not an allegation of fact, but a legal conclusion. To the extent that the
21 Commission deems an answer to this section of the Complaint necessary,
22 NorthWestern is without sufficient knowledge to admit or deny the
23 statement made and therefore denies the same.”

1 Since NorthWestern denies that it “may not avoid reasonable
2 regulation by contract,” (meaning that it asserts it may avoid reasonable
3 regulation by contract) pursuant to what authority can NorthWestern avoid
4 reasonable regulation by contracting with Montana cities for street
5 lighting? Also, define “fact” and “legal conclusion” and any other term
6 necessary to answer this question in a way that is consistent with the law
7 and explain briefly. If NorthWestern fails to brief this question, the ¶ 26
8 allegations will be deemed admitted.

9 31. Paragraph 28 of the Complaint pled: “None of the contracts that
10 Northwestern Energy has with the City of Billings for the lighting districts
11 mentioned in Tables 2 & 3 contains the words "lease," "rent," lessor,"
12 "lessee," "landlord," or "tenant," or plurals of those words.”

13 NorthWestern responded: “NorthWestern is without sufficient
14 knowledge to admit or deny that all of its contracts with the City of
15 Billings do not have the words contained in the paragraph, but does admit
16 that some of its contracts with the City of Billings do not contain such
17 words.”

18 If there have been any orders or tariffs of the Commission where
19 NorthWestern has been granted permission to lease or rent street lights
20 that it owns, please cite to those orders and to the appropriate page number
21 in them where that permission has been granted and provide a copy of
22 those pages? Also, define any term necessary to answer this question in a

1 way that is consistent with the law and explain briefly. If NorthWestern
2 fails to brief this question, the ¶ 28 allegations will be deemed admitted.

3 3m. Paragraph 29 of the Complaint pled: “If a Northwestern Energy customer
4 does not own a street light, and if Northwestern Energy provides a street
5 light for that customer, Northwestern levies an ownership charge on each
6 street light that Northwestern provides under its Schedule No. ELDS-I,
7 Electric Lighting Delivery Service Tariff.”

8 NorthWestern responded: “NorthWestern admits that it levies an
9 ownership charge on street lights that it provides under the Tariff noted in
10 the above paragraph. NorthWestern is without sufficient knowledge to
11 admit or deny all other material allegations contained in this paragraph
12 and therefore denies the same.”

13 Complaint Paragraph 36 alleged: “When Northwestern provides a
14 customer with a street light, it determines the average total per-unit cost of
15 that street light (or those street lights).”

16 NorthWestern responded: “NorthWestern states that the paragraph
17 above is vague as it is unsure what definition Complainants have given to
18 the term "customer." As such, NorthWestern is without sufficient
19 knowledge to admit or deny any material allegation contained in this
20 paragraph and therefore denies the same.

21 Complaint Paragraph 38 alleged: “Once it has determined the
22 average total per-unit cost of a street light, to determine the Ownership
23 charge, Northwestern looks to see what cost range that installation falls in

1 on Schedule No. ELDS-I and places the unit (or units) in the proper "Cost
2 Range."

3 NorthWestern responded: "NorthWestern admits that the
4 ownership charge is calculated by consulting the applicable tariff to
5 determine the proper "Cost Range." NorthWestern is without sufficient
6 knowledge to admit or deny all other material allegations contained in this
7 paragraph and therefore denies the same.

8 Complaint Paragraph 39 alleged: "Once the unit to be provided to
9 Northwestern's customer has been placed in the proper "Cost Range," and
10 the street light is operational, Northwestern begins to charge the customer
11 a monthly unit rate ownership charge associated with the "cost range"
12 specified in Schedule No. ELDS-I.

13 NorthWestern responded: "NorthWestern states that the paragraph
14 above is vague as it is unsure what definition Complainants have given to
15 the term "customer." As such, NorthWestern is without sufficient
16 knowledge to admit or deny any material allegation contained in this
17 paragraph and therefore denies the same

18 Complaint Paragraph 40 alleged: "At some point in time, the
19 ownership charge that Northwestern levies will completely recover the
20 total costs of providing the street lighting infrastructure detailed in
21 paragraph 34) and repay Northwestern Energy for its investment plus an
22 allowed rate of return on that investment."

23 NorthWestern responded: "NorthWestern denies."

1 Complaint Paragraph 118 alleged: “NorthWestern Energy uses a
2 depreciation schedule for its street lights that assumes SILMD # 261 street
3 lights will be paid for in approximately 30 years when in fact the
4 ownership charge completely pays for them in less than 15 years.”

5 NorthWestern responded: “NorthWestern admits that it has a
6 depreciation schedule for street lights but denies all other allegations in
7 this paragraph.”

8 Therefore, to bring clarity to the assessment of ownership charge
9 issue, for Billings SILMDs # 261, 262 & 228, brief the process from start
10 to finish of exactly how the street lighting infrastructure is valued; how the
11 ownership charge is determined and assigned to the City of Billings and its
12 residents of an SILMD; and how the value is added to and subtracted from
13 NorthWestern’s rate base? Also, state the number of years involved in the
14 depreciation schedules to which these street lights or any component of
15 them is assigned and define “customer” and any other term necessary to
16 answer this question in a way that is consistent with the law and explain
17 briefly. And state how long the lights in SILMDs 261, 262 & 228 have
18 been in service. If NorthWestern fails to brief this question, the ¶ 29, 36,
19 38, 39, 40 & 118 allegations will be deemed admitted.

20 3n. Paragraph 54 of the Complaint pled: “Cross-subsidization is illegal under
21 Montana law.”

22 NorthWestern responded: “NorthWestern states that the law speak
23 [sic.] for itself.” If NorthWestern believes that in “speaking for itself,” the

1 law does not prevent cross-subsidization, what Montana law authorizes
2 cross-subsidization when NorthWestern is providing electricity to street
3 lights within NorthWestern's service area? Also, define any term
4 necessary to answer this question in a way that is consistent with the law
5 and explain briefly. If NorthWestern fails to brief this question, the ¶ 54
6 allegations will be deemed admitted.

7 NorthWestern Energy is ordered to submit a brief on the above-referenced
8 items in paragraphs 3h through 3n, containing no more than 10,000 words, on or
9 before _____, 2013. Complainants are ordered to submit a response to
10 NorthWestern Energy's brief, containing no more than 10,000 words, on or before
11 _____, 2013. NorthWestern Energy may submit a reply brief, containing no
12 more than 5,000 words, on or before _____, 2013.

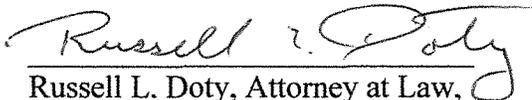
13 **Request for an Order to Show Cause:** NorthWestern Energy is ordered to
14 appear in the Commission's hearing room at 1701 Prospect Av, Helena, MT on June
15 _____, 2013 to show cause why this Commission should not order a temporary rate
16 reduction by elimination of the ownership charge assessed for rates charged in:

- 17 a) all SILMDs listed on Tables 2 and 3 attached to the Complaint in this matter;
18 b) all other SILMDs where NorthWestern owned street lights have been in service
19 for more than 15 years, and
20 c) any other service area where NorthWestern owned street lights have been in
21 service for more than 15 years.

22 And to show cause why this Commission should not order NorthWestern to

- 1 a. allow municipalities and other customers to install and own energy
2 efficient LED street light luminaires on poles owned by NorthWestern that
3 previously held the high pressure sodium or other street or area lights
4 being replaced;
- 5 b. requiring Northwestern Energy to provide electric service to the customer-
6 owned lights on Northwestern poles and other infrastructure if the
7 customer so chooses; and
- 8 c. preventing Northwestern Energy from destroying, moving or otherwise
9 rendering inoperative existing light poles, lighting pole arms, pole bases,
10 wiring, meters or other equipment needed to distribute electricity to
11 customer-owned luminaires or other equipment being served under the
12 ELDS-1 or other tariff unless the customer agrees to such destruction, or
13 move.

14
15 Respectfully submitted,

16 

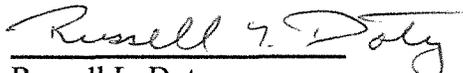
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23

Monday, May 6, 2013

CERTIFICATE OF SERVICE

I, Russell L Doty, certify that pursuant to ARM 38.2.313 on May 6, 2013, an accurate copy of the foregoing **Motion to Reconsider Procedural Order NO. 7084e in Docket No. D2010.2.14** was served upon the parties listed below in the manner provided:

<input checked="" type="checkbox"/> XX US Mail Original w/ 10 copies <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> E-mail:	Kate Whitney, Montana Public Service Commission 1701 Prospect Av PO Box 202601 Helena, MT 59620-2601 Email: kwhitney@mt.gov
<input checked="" type="checkbox"/> XX US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> E-mail:	Brenda Elias, Montana Public Service Commission 1701 Prospect Av PO Box 202601 Helena, MT 59620-2601 Email: belias@mt.gov
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