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8 **DEPARTMENT OF PUBLIC SERVICE REGULATION**  
9 **BEFORE THE PUBLIC SERVICE COMMISSION**  
10 **OF THE STATE OF MONTANA**  
11

12 IN THE MATTER OF the Petition of ) UTILITY DIVISION  
13 Dr. Paul Williamson, Rev. Dr. Vern ) DOCKET NO. D2010.2.14  
14 Klingman, Patricia Klingman & Russell )  
15 L. Doty, on Behalf of Themselves & Others )  
16 Similarly Situated, )  
17 Complainants, )  
18 vs. )  
19 )  
20 Northwestern Energy, )  
21 Respondent. )  
22

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23 **COMPLAINANTS' RESPONSE TO NORTHWESTERN ENERGY'S**  
24 **OPPOSITION TO COMPLAINANTS' REQUEST FOR RECONSIDERATION**

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25  
26 **Argument**  
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28 **Amendment is Allowed as a Matter of Right.** NorthWestern contends a  
29 request for reconsideration cannot be based on an amended complaint. They cite no  
30 caselaw authority for this contention. The rule that is cited, namely ARM § 38.2.1207,  
31 does not support NorthWestern's position. That rule clearly allows amendments to  
32 "any pleading or document" prior to notice of hearing. Since there has been no notice  
33 of hearing in this case, amendment is allowed as a matter or right.

34 Even if amendment were not allowed as a matter of right, amendment "may be  
35 authorized in the discretion of the Commission." Even though it was not necessary,  
36 Complainants have previously requested permission to amend the pleadings as new

1 data was developed. That request has never been ruled on. It is not now mooted by  
2 the series of events that have transpired.

3 While the Commission's rule allowing amendment should be dispositive, if  
4 there is a need to know what is done in federal pleading generally followed in state  
5 rules of civil procedure, the Commission is referred to The Law of Federal Courts,  
6 Charles Alan Wright, 3<sup>rd</sup> Ed. 1976, a Hornbook on pleading. It provides at page 310:

7 The provisions of Rule 15(a) allowing amendment as of right should  
8 control over other, more guarded, provisions of the rules. Thus, while the cases  
9 are divided, the better view is that so long as amendment as of right is  
10 possible, a party may amend to add an omitted counterclaim without satisfying  
11 the test of Rule 13(f)<sup>1</sup> and may add or drop parties without obtaining a court  
12 order under Rule 21.<sup>2</sup> [Emphasis added.]

13 In discussing the conditions under which leave to amend should be granted  
14 after amendment by right is no longer possible, Wright notes at page 311:  
15

16 The rule provides, however, that "leave shall be freely given when  
17 justice so requires," and refusal to permit amendment is an abuse of discretion  
18 in the absence of some justification for the refusal.<sup>3</sup> ... The test whether  
19 amendment is proper is functional rather than conceptual. It is entirely  
20 irrelevant that a proposed amendment changes the cause of action or the theory  
21 of the case, or that it states a claim arising out of a transaction different from  
22 that originally sued on, or that it causes a change in parties.<sup>4</sup> Normally leave to  
23 amend should be denied only if it would cause actual prejudice to an adverse  
24 party. . . . [Emphasis added.]  
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<sup>1</sup> Citing *A.J. Industries, Inc. v. United States District Court*, C.A. 9<sup>th</sup>, 1974, 503 F.2d 384; 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1479, pp.402-404. Contra: *Stoner v. Terranella*, C.A. 6<sup>th</sup>, 1967 372 .2d 89.

<sup>2</sup> Citing *McLellan v. Mississippi Power & Light Co.*, C.A. 5<sup>th</sup>, 1976, 526 F.2d 870, citing the divided cases from the district courts. See also 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1479, pp.400-402.

<sup>3</sup> Citing *Foman v. Davis*, 1962, 83 S.Ct. 227, 230, 371 U.S. 178, 182, 9 L.Ed.2d 222; *Lone Star Motor Import v. Citroen Cars Corp.*, C.A. 5<sup>th</sup>, 1961, 288 F.2d 69, 75; 6 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 1484, 1487.

<sup>4</sup> Citing *Sherman v. Hallbauer*, C.A. 5<sup>th</sup>, 1972, 455 F.2d 1236; *Polin v. Dun & Bradstreet, Inc.*, C.A. 10<sup>th</sup>, 1975, 511 F.2d 875; *Staggers v. Otto Gerdau Co.*, C.A.2d, 1966, 359 F.2d 292; and cases cited 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1474 nn. 98-10.

Complainant's Response to NWE's Objection to Amendment, Etc.

1           In this case NorthWestern can claim no prejudice because there is none. It had  
2 notice of the claims against it. It knows it is overcharging and it is the keeper of the  
3 records on that issue—records it has refused to produce to enlighten the Commission,  
4 complainants, and others directly affected by NorthWestern's overcharges. It will have  
5 adequate opportunity to prepare for hearing as required by ARM § 38.2.1207.

6           There are good reasons for the addition of parties to meet Northwestern's  
7 objections concerning lack of standing. Addition of complainants eliminates the standing  
8 issue so the Commission can reach the merits. NorthWestern should not be allowed to tie  
9 this matter up in the Courts for months litigating the standing question and thereby  
10 avoiding having to cut its \$61,000 a month overcharge to beneficiaries of street lights in  
11 Billings and reduce its likely \$180,000 a month street lighting overcharge system wide.

12           Also, the addition of parties is based on complainant's attempts to be responsive  
13 to the discussions that the Commission had during its work session on the matter. With  
14 the addition, the Commission can now consider complainants as a whole to be more  
15 directly affected by the street lighting tariff than the original complainants. This is a class  
16 action and several types of directly affected persons are now represented by the named  
17 complainants. That is, residential customers who are also property taxpayers assessed as  
18 members of a SILMD are added to the persons representing renters and other who are not  
19 in a lighting district but who are customers of NorthWestern, and non-customers who are  
20 nevertheless taxpayers, all of which have a small portion of their property taxes go to  
21 defraying the city's prorate share of street lighting costs.

1           **Not Necessary for Complainants to Refile.** Wright also address “a very strange  
2 distinction” found in some early cases that required dismissal of a defective complaint  
3 making it necessary for complainants to start over again. He says:

4                       Such a distinction had no support in the language of Rule 15(d) and was  
5 the kind of arbitrary and mechanical procedural barrier that the rules generally do  
6 not countenance.

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8           **In summary.** It would be a clear abuse of discretion if the Commission were to  
9 disallow the amendment to the complaint.

10           **Once the amendment has been made, it relates back to the beginning.** This  
11 has long been the case under Federal Rule 15 (c) which is mirrored by Montana Rule of  
12 Civil Procedure 15(c) found in chapter 20 of MCA at  
13 <http://data.opi.mt.gov/bills/mca/25/20/25020003153.htm> .

14           **Complainant's Reconsideration Request Conforms to Rules.** NorthWestern  
15 asserts that complainants do not ask for reconsideration on the basis that the decision was  
16 unlawful, unjust, or unreasonable.

17           Complainant's Petition for Reconsideration statements that “Complainants do not  
18 have to be “customers” or “ratepayers” to be directly affected. Under the statute, they are  
19 ‘persons’” is an assertion that the Commission's ruling focusing solely on customers or  
20 ratepayers who must be directly affected is unlawful because it ignores the word  
21 “persons” in the law. The Commission's ruling is unreasonable because it denies persons  
22 directly affected the right to petition to have utility overcharges reduced.

23           Further, Complainant's statement that “Order No. 7084a denies petitioners Article  
24 II, § 17 due process, their Art. II, § 16 Montana constitutional right to a remedy for  
25 wrong, and their Art. II, § 3 right to a clean and healthful environment” is a claim that the

1 order to be reconsidered ((7084a) is unlawful because it denies Montana constitutional  
2 rights.

3 NorthWestern further asserts that we do not challenge the Commission's  
4 determination that we lack standing. However, later in its document NorthWestern,  
5 belying its prior contention, acknowledges that complainants spend a great deal of time  
6 discussing the meaning of the word "direct" and explaining why we have standing. The  
7 reference to the other statutes where the word direct is used are illustrative of a broader  
8 interpretation of the word to include instances where direct medical billing for example  
9 encompasses bills that flow through ministerial persons actually generating the bills in  
10 much the same way that cities now perform the ministerial accounting for the utility—  
11 something which if it were eliminated would save the government money, reduce the  
12 charge on the property tax bill and require NorthWestern to bill the ultimate ratepayer  
13 without the city performing that ministerial function for NorthWestern.

14 It is immaterial that a middleperson is involved in apportioning street light costs  
15 to various property owners, the person who gets hit with the ultimate "tab" is directly  
16 affected. Citing a definition of "direct" that includes "primary" liability in another statute,  
17 the Petition for Reconsideration specifically states "**In this complaint, the taxpayer,  
18 renter, or fee payer is ultimately responsible that is to say "primarily liable" for  
19 paying the bills of the city or county.**" To the extent that the Commission fails to  
20 recognize this fact, it is in error and is being unreasonable and unjust in its application of  
21 the statute. Such a determination denies the persons who ultimately pay the bill a right to  
22 direct redress of their grievances without having to attempt the time consuming and  
23 complicated procedure of explaining utility ratemaking to a city council that in many

Complainant's Response to NWE's Objection to Amendment, Etc.

1 cases is beholden to the utility because of the utility's involvement in local politics. The  
2 Reconsideration request specifically indicates unlawfulness. It says, "So to the extent that  
3 the Commission Order No. 7084a advises that, its order does not limit the ability of  
4 directly affected "customers" to file complaints, it is in error because its interpretation is  
5 more restrictive than the statute."

6 NorthWestern claims we have added complainants "who may or may not" be  
7 directly affected by the street lighting tariff. The amended complaint indicates in more  
8 detail how the original complainants are affected through their property taxes. The  
9 amended complaint and documents attached to it also indicate in excruciating detail how  
10 the added complainants are affected as persons assessed for SILMD fees. Thus, it is  
11 undeniable that all complaints are directly affected, although in different ways, by  
12 NorthWestern's street lighting overcharge. Complainants also demonstrate in their  
13 amendment how they and persons within a lighting district are affected differently and in  
14 different dollar amounts to overcome NorthWestern's inaccurate claim that we are  
15 affected in the same way.

16 NorthWestern asserts that no factual background is included to explain  
17 complainant's assertion that the PSC didn't look closely at NWE's rates and that the cost  
18 of service study was flawed. In fact NorthWestern can't deny the facts that for 16 years  
19 the mathematically pled and proven fact that the ownership charge has completely  
20 defrayed the original cost of street lights in Billings SILMD # 214 (Amended Table 2,  
21 Col. C). All of the other Billings SILMDs on amended Table 2 have had the street  
22 lighting infrastructure completely paid for from three tenths of a year to 13.8 years. Those  
23 facts indicate conclusively that NorthWestern's depreciation schedule is out of whack

Complainant's Response to NWE's Objection to Amendment, Etc.

1 with the ownership charge. NorthWestern's assertions to the contrary do not change that.  
2 Bob Rowe didn't look closely at it when he should have and neither did Monica Tranel  
3 when she was Commission attorney. If they want to file affidavits saying how closely  
4 they looked at the street lighting rates, let them have at it. Until then, the facts alleged by  
5 complainants must be viewed in a light most favorable to complainants for the purposes  
6 of any motion to dismiss.

7         The reason why those facts confer standing on complainant Doty is because they  
8 demonstrate that he is an expert and that all of the other "experts" missed the overcharge  
9 for almost two decades. Those facts confer standing because no other person has or will  
10 build a record on which the PSC can make a decision to eliminate a \$2.1 million  
11 overcharge. If they haven't built the record in 16 years, what makes anyone think it will  
12 get built now?

13         Commission Order No. 7084a found that Complainants did not specifically allege  
14 that a reduction in nighttime energy use would reduce fossil fuel generation of electricity.  
15 And therefore, the Commission rejected Complainant's claim that they had standing to  
16 address a matter of overriding public concern. No person knowledgeable in public utility  
17 law would claim that a reduction in nighttime lighting requirements would not reduce the  
18 burning of fossil fuel. That fact must be viewed in the light most favorable to  
19 Complainants for purposes of the motion to dismiss. There is no affidavit or claim by  
20 NorthWestern to the contrary. Indeed the Commission should take administrative notice  
21 of the records in other proceedings indicating that a large percentage of base load power  
22 comes from PPL and NorthWestern coal plants that continue to generate power at night.

Complainant's Response to NWE's Objection to Amendment, Etc.

1 To the extent that nighttime load can be curtailed, base load generation from fossil fuel  
2 can be reduced.

3 Will Rogers is said to have quipped, "Folks are smarter now. They are letting  
4 lawyers, rather than their conscience be their guide." Let your conscience be your guide.  
5 Get past the standing question that is costing Montanans \$180,000 a month in  
6 unwarranted overcharges. The earth is heating up because humans are burning too much  
7 fossil fuel. That denies Montanans their Constitutional right to a clean and healthful  
8 environment. Cutting nighttime lighting energy requirements by 50% will help mitigate  
9 blazing nights that shut down photosynthesis when temperatures rise above 90 degrees F.  
10 The street lighting overcharge can be used to pay for a transition to a saner use of energy  
11 and then eliminated to the benefit of consumers. We don't have much time to reverse the  
12 mounting effects of global warming. Let your conscience be your guide.

13 Respectfully submitted.

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June 24, 2010

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CERTIFICATE OF SERVICE

I, Russell L. Doty, certify that on June 24, 2010, a true and accurate copy of the foregoing **COMPLAINANTS' RESPONSE TO NORTHWESTERN ENERGY'S OPPOSITION TO COMPLAINANTS' REQUEST FOR RECONSIDERATION** was served upon the parties listed below by depositing it, postage prepaid, in the US mail or in the case of the Klingmans & Dr. Williamson by supplying it by email.

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