

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

)	<u>UTILITY DIVISION</u>
IN THE MATTER OF THE)	
PETITION OF)	COMPLAINANTS
JAMES T. & ELIZABETH A. GRUBA,)	RESPONSE OPPOSING
LEO G. AND JEANNE R. BARSANTI,)	MOTION TO SUSPEND
& MICHAEL W. AND FRANCES E.)	PROCEEDINGS
PATERSON, ON BEHALF OF)	
THEMSELVES & OTHERS)	
SIMILARLY SITUATED,)	
Complainants.)	
VS.)	
)	
NORTHWESTERN ENERGY,)	
Defendant.)	<u>DOCKET NO. D2010.2.14</u>

Complainants oppose the Motion to Suspend by NorthWestern Energy (NWE) unless suitable security in lieu of a bond is tendered by NWE as required by Mont.R.Civ.Pro., Rule 62(c).¹ Also, Contrary to NWE’s assertion, the Public Service Commission (PSC or Commission) has jurisdiction to proceed in the processing of the Gruba *et al.* complaint.

¹ **(c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. [Emphasis added.]**

Jurisdiction to decide NWE's motion. Although the issue has not been raised or briefed by NWE, Complainants note that the Public Service Commission has jurisdiction to rule on NWE's Motion to Suspend Proceedings, but **only pursuant to Mont.R.Civ.Pro., Rule 62(c)**. Otherwise the suspension of proceedings motion that NWE wants decided must be brought before the Montana Supreme Court (and not the PSC) pursuant to Mont.R.Civ.Pro., Rule 62(g).²

NWE's motion does not comply with rules. NWE does not state the rule under which it is seeking its motion—likely Mont.R.Civ.Pro., Rule 62(c). Nor does NWE offer to post the bond required by that rule to suspend proceedings that otherwise may continue during the pendency of an interlocutory appeal.

Law cited by NWE is immaterial, misquoted, or outdated. The rules governing proceedings in a non-appellate body are different when an interlocutory appeal is in progress (as here), than when the appeal is from a final order or judgment (which is not the case here). Therefore, all the cases

² **(g) Appellate Court's Power Not Limited.** This rule does not limit the power of the appellate court or one of its judges or justices:

- (1) to stay proceedings -- or suspend, modify, restore, or grant an injunction -- while an appeal is pending; or
- (2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

NWE cites are immaterial, outdated, or misquoted. For example, *Montana Consumer Counsel v. Public Service Commission*, 541 P.2d 770, 168 Mont. 180 (1975), does not contain the ruling NWE falsely claims is therein.

The other cases NorthWestern relies on deal with final order appeals, not interlocutory appeals.³ That is, a MCA § 69-3-304 request for a temporary rate decrease or increase is a request for a temporary injunction. Under that statute, the appeal is from an “intermediate agency action subject to judicial review under the Montana Administrative Procedure Act.” Thus, as an “intermediate agency action,” it is an interlocutory appeal which does not prevent the body from which the appeal is taken from going forward with the case at hand.

Thus, to be legal NorthWestern must post bond or an assurance in lieu of a bond that it will reimburse its street lighting customers at least \$183,000/month for any “ownership” overcharge that the Commission determines is occurring plus reimbursement for the cost of energy that would not have been used if NorthWestern had not refused to install energy efficient street lights in a timely manner. The bond or assurances must cover the time the suspension is in effect until the Supreme Court rules

³ Even some of those cases have been superseded by newer rules like Mont.R.Civ.Pro., Rule 62(b) that, for example, in some circumstances allow a lower court to amend its findings after an appeal has been taken.

on the temporary rate reduction request. Such a bond is required by Mont.R.Civ.Pro., Rule 62(c). And an assurance in lieu of bond is allowed in place of the bond by Mont.R.Civ.Pro., Rule 62(f)(1).⁴

Consumers gain nothing and lose more than \$183,000 a month if the Commission allows NorthWestern to further delay resolution of the overcharge and street light energy conservation questions but suspending these proceedings. Why? Because the Commission currently follows the rule against retroactive ratemaking⁵ affirmed in *Mountain Water Co. v. Montana Dept. of Public Service*, Docket No. 91-446 (1992). Thus unless that rule is abrogated in specific cases where the utility has wrongly mismatched its depreciation schedule with a tariff that pays for the infrastructure before those facilities are depreciated, or unless this temporary rate reduction request is granted, the ongoing street lighting overcharge will continue to inflate Montanans' SILMD property tax payment line unjustly.

So, for the reasons stated below, while NWE's motion could be granted if it posted bond, Complainants believe the better course of

⁴ **(f) Security Other Than Bond -- Stipulation of Parties.**

(1) In all cases under this rule where supersedeas bond or other terms that secure the opposing party's rights are required, the court, in its discretion, may allow alternate forms of security other than a bond, when adequate equivalent security is provided and the appealing party can show that the judgment creditor's recovery is not in jeopardy.

⁵ The rule against retroactive ratemaking is sometimes called the "water over the dam principle."

action is for the PSC to continue to process the complaint, grant the temporary rate reduction, and thereby moot the temporary rate reduction issue pending in the Supreme Court.

NWE's rationale rebutted. NorthWestern Energy contends it should not have to answer the complaint in this matter until after an appeal of whether or not a temporary rate decrease request should be granted is decided by the Supreme Court.

1) In support of this request **NWE falsely claims the case of** *Montana Consumer Counsel v. Public Service Commission*, 541 P.2d 770, 168 Mont. 180 (1975) **held “during the pendency of this appeal, the [PSC] shall refrain from further actions which may tend to interfere with this Court’s jurisdiction on appeal of this matter.”** That wording is **not in the Court’s October 17, 1975 order in that case** (Court Docket No. 12944).⁶ That wording also is not in the case of *State Ex Rel. Montana Power v. Dept. of Public Serv.*, Case # 13207 (Dec. 30, 1975).

Montana Consumer Counsel, at p. 7 held that when Montana Power sought a ruling on limited issues not requiring a full-blown rate hearing, the PSC had discretion to entertain limited (i.e., mini-hearing) consideration of the temporary rate increase and automatic adjustment issues brought up. The

⁶ Also, the citation that NorthWestern uses (i.e., 168 Mont. 177, 541 P.2d 769) for this case appears to be incorrect.

Commission did not have to engage in a full blown rate case as requested by the Consumer Counsel. Contrary to NorthWestern’s assertion, that case affirmed the PSC—it did not hold as NWE's brief falsely asserts⁷ “that the PSC was acting beyond its jurisdiction when it issued subsequent orders in a matter that was currently pending before the Supreme Court on appeal.”⁸

Nothing in the temporary rate increase and decrease statute (MCA § 69-3-304) or elsewhere limits the power of the Commission to go forward with its proceeding during the time period when the temporary rate issue is on appeal. The Commission could be limited if NWE made a Rule 62(g) motion to the Supreme Court that was granted. However, no such motion has been made.

Indeed to refuse to go forward by granting NWE's motion to suspend further violates petitioners’ right to a complete, speedy remedy guaranteed by Article II, § 16 of Montana’s Constitution. And if the Commission did act prior to the Court’s determination of that issue, it would, as pointed out in the brief of Gruba, et al. to the Supreme Court, moot that issue. The following precedent allows the Commission to act in a fashion that will moot the temporary rate reduction issue being appealed.

⁷ p. 5, lines. 13-15.

⁸ I appeared as counsel for the PSC in that case.

See *Ground v Dept. of Highways*, Docket No. 83-545 (1984), where Mr. Ground sued the Department of Highways for declaratory, injunctive, and monetary relief from the imposition of a sales tax on new motor vehicles on members of the Blackfeet Tribe residing on the Tribal Reservation. Ground filed an interlocutory appeal from an order of the Lewis and Clark County District Court denying Ground's motion to certify his case as a class action. The court dismissed the appeal as moot after the Department of highways began “refunding all taxes imposed on reservation Indians after April 1, 1983.”

Action mooting the portion of complainant’s appeal in the Supreme Court dealing with the temporary rate decrease would be accomplished if this Commission granted complainants’ temporary rate request as discussed below. There is no reason to wait. In *Schuff v. A.T. Klemens Son*, 2000 MT 357 ¶ 49 , 303 Mont. 274, 16 P. 3d 1002, the Court determined:

¶49 For starters, the motion to disqualify should have been attached to a request for an injunction under the irreparable harm theory. **(4) If denied, the district court's order could have been reviewed by this Court subject to an interlocutory appeal, without awaiting the outcome of the related litigation.** See Rule (1)(b)(2), M.R.App.P. (permitting interlocutory appeal from an order granting or refusing to grant an injunction). Such an appeal could have led to an order staying the proceedings below. See Rule (1)(b)(2) M.R.App.P.⁹ [Emphasis added.]

History of Temporary Rate Reduction Request. Petitioners' initial and amended complaint request for a temporary rate reduction was not ruled on by the Commission or District Court because determination of the standing issue prevented it. That 26 month delay has cost Montana tax and ratepayers more than \$4.2 million while unjustly enriching NorthWestern insiders and stockholders. To stop the fiscal hemorrhaging, when this case was remanded to the District Court, Grubas and Barsantis reinstated their request for a temporary rate decrease.

The District Court declined to apply MCA § 69-3-304 even though application of that law was appropriate because the Commission had previously avoided the issue by erroneously refusing to allow Petitioners' amended complaint and by denying standing to the Barsantis and Grubas.

⁹ The citation in this case to the Rules involved has changed when the rules were rewritten. However, the principle (of review in interlocutory cases while the main case continues) is still good law.

The District Court held “petitioners’ request is premature.” It bought NWE's argument by reasoning that the PSC would have to first act on the request before the Court could sit as an appellate body. It is ironic that NWE is now contending that the PSC cannot proceed until arguments on its position are decided by the Supreme Court.

The District Court’s determination would be within the bounds of reason if the PSC had not previously rejected two requests to apply § 69-3-304. The dual rejection delayed action needed to protect the Constitutional rights of Barsantis and Grubas and others SILMD participants who are enduring ongoing overcharges, which in some cases have existed for longer than 16 years.

Ruling on MCA § 69-3-304 needed to protect constitutional rights.

Under these circumstances Complainants believed the Supreme Court must review the PSC’s inaction on the temporary rate reduction request and not wait for additional PSC consideration. If the PSC acts as it should while this Court considers this issue, that issue will be mooted. Lacking that, further delay in applying MCA § 69-3-304 must be prevented if rights guaranteed by Montana’s Constitution mean anything.

The Montana Constitution, Article II, § 16) requires:

Section 16. The administration of justice. Courts of justice shall be open to every person, and **speedy remedy afforded for every injury**

of person, property, or character. . . . Right and justice shall be administered without sale, denial, or delay. [Emphasis added.]

There is a definite injury to property here. Property taxpayers are being unjustly assessed \$61,000 a month in Billings--triple that in NorthWestern's system. The two to 16 year delay in addressing that injury of property denies justice in violation of our Constitution.

Further delay strips Barsantis and Grubas and persons in their class of their Article II, § 16, Montana Constitutional rights. It blocks their efforts to protect their property from ongoing unlawful utility rate gouging sanctioned by a regulatory body that used to be chaired during part of the profiteering involved by the very person who now sits at the head of the offending utility.¹⁰

This Court refrains from interpreting a statute in a manner that would defeat its purpose. *Hawley v. Board of Oil and Gas Conservation*, 2000 MT 2, ¶ 12, 297 Mont. 467, ¶ 12, 993 P.2d 677, ¶ 12 (citation omitted); *Juro's*, ¶ 21. One purpose of MCA § 69-3-304 is to provide justice to those adversely affected by overcharges of monopoly utilities. Thus, because the PSC

¹⁰ The undersigned has experienced how litigation delays unjustly enrich utilities to the detriment of Montana ratepayers. He was the lead substitute plaintiff in the Qwest case where it took 5 years to institute a rate reduction of \$16 million a year. Thus, the delay unjustly enriched Qwest by \$80 million that was not recovered under the terms of the eventual case resolution.

refused to act (for whatever reason) the District Court had statutory authority to rule on the temporary rate reduction request long ago. To interpret § 69-3-304 (or the misapplication of rules of jurisdiction which have prevented application of that statute) in a manner that allows even more delay defeats the purpose of having a temporary rate decrease.

Petitioner’s Motion Arguments for Rate Reduction. In their March 5, 2012, Motion for a Rate Reduction, Petitioners’ detailed their justifying rationale. Part of it is reproduced here:

In Paragraph 59 of their Appeal to the District Court, Complainants/Petitioners respectfully asked the District Court:

- A. to find that the Public Service Commission abused its discretion and erred in not immediately ordering a temporary street lighting tariff rate reduction in SILMDs where the “ownership charge” component of the street lighting tariff had paid for the lighting infrastructure, and
- B. to itself order that where the “ownership charge” component of the street lighting tariff had paid for the lighting infrastructure it should be forthwith eliminated from the rate tariff for those SILMDs affected by the complete payment of the infrastructure portion (i.e., ownership charge) of the tariff; that the temporary rate reduction be subject to review by the Commission and the rate subject to reinstatement after such review if the Commission in following its statutes so determines, that no bond be required for the granting of this request which is in the nature of a temporary injunction because any under collection of the rate can later be corrected by a future assessment and because gross over collection of millions of dollars is already in itself enough cushion for the bonding required during the temporary rate reduction.

...

The statutory authority for this Court to immediately review the Commission's decision to not grant a temporary rate reduction request is found in Montana Statutes § 69-3-304, which provides:

69-3-304. Temporary approval of rate increases or decreases. The commission may, in its discretion, temporarily approve increases or decreases pending a hearing or final decision. If the final decision is to disapprove an increase, the commission may order a rebate to all consumers for the amount collected retroactive to the date of the temporary approval. If the final decision is to disapprove a decrease, the commission may order a surcharge to be paid by all consumers for the amount not collected retroactive to the date of the temporary approval. The commission shall order interest to be paid on a rebate or surcharge as determined by the commission. An order of the commission approving or denying a temporary rate increase or decrease shall be based upon consistent standards appropriate for the nature of the case pending and shall be an intermediate agency action subject to judicial review under the Montana Administrative Procedure Act. [Emphasis added.]

The overcharge was explained in footnote 18 of Petitioner's reply brief to the District Court:

¹⁸ See (Administrative Record Item 8) 4/1/10 Affidavit & Brief in Opposition to NorthWestern's MTD, pp. 4, 7, 10, 11, 14, 18, 23, 24, 26, 30, 31, 33, 34, 36 & 37). The overcharge results because taxpayers who support street lighting are being required to pay more than the original cost of the street lighting infrastructure, and allowed return on investment for the street lighting service. MCA § 69-3-109 prohibits the inclusion of property in a rate base at a value in excess of original cost.

69-3-109. Ascertaining property values. The commission may, in its discretion, investigate and ascertain the value of the property of each public utility actually used and useful for the convenience of the public. The commission is not bound to accept or use any particular value in determining rates. **However, if any value is used, the value may not exceed the original cost of the property,** except that the commission may include all or

some of an acquisition adjustment for certain property purchased by a public utility in the purchasing utility's rate base if the transfer of the property to the purchasing utility is in the public interest.... [Emphasis added]

Under vigilant regulation as required by MCA § 69-3-201 (quoted below) the utility is then allowed to recover its investment in the utility property (i.e., its original cost) plus a reasonable rate of return to cover the costs of financing the utility's investment.

In the case of its street lights, Northwestern maneuvered around the law by putting its street lighting infrastructure in the rate base at original cost and depreciating it over approximately 30 years. However, the lighting tariffs allow for full original cost recovery with allowed rate of return within 10 to 15 years. This mismatch of depreciation and tariff rates creates an overcharge. In addition to the statistics pled in the Petition, the Court is asked to take judicial notice of the undeniable mathematical facts that in all but a few isolated cases, certain rates charged by NorthWestern under its tariff will more than cover the original cost of a street light plus an allowed rate of return in periods far short of 30 years.

Petitioner's contended at page 21 of their reply brief that:

While it is true that here the record is not as complete as it would have otherwise been but for the Commission's being remiss for 16 years in failing to develop or allow development of the record concerning a temporary street lighting rate reduction, that does not mean that the record is too scant for this Court to rule generally on the specific issues presented and to remand to the Commission for specific findings (as has been requested in Petition ¶¶ 69(B) & 78) as to which Street Lighting and Maintenance Districts have been overcharged. ...

When it is mathematically certain that the "ownership" charge levied by the utility has covered the original cost of the street lighting infrastructure in a lighting district plus the

allowed rate of return, the Court need not know more in order to generally order a temporary rate reduction.

...

I'm also reprinting my oral argument on this issue which begins at page 11, line 6 of the partial transcript of that argument. ... It provides:

... All we're asking for is not to determine the minutia of which of the two hundred and some lighting districts in Billings and around the state deserve a rate decrease, we think it's 85 percent of the districts in Billings and probably the same number around the state, not for you to determine the

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minutia, but to say that there has to be a rate reduction. And the reason for that is that if there's no rate reduction at this particular point in time, this case drags on for another two years before the Montana Supreme Court goes back to the Public Service Commission and the people of Montana have lost approximately \$180,000 a month in overcharges that they likely would not be able to recover because of a utility principle in public utility law called The Water Over the Dam Principle.

If, on the other hand, you order a temporary rate reduction and let the Commission and NorthWestern Energy sort out the -- you know, where that should occur, then if on hearing at the -- you know, after all the appeals go forth, there can also be an increase under the statutes if, in fact, the temporary rate reduction was improper, so there's no loss to NorthWestern Energy if that happens. And there's no reason why that particular issue is not any more ripe -- or any less ripe than it would be if the utility were coming before the Commission at the beginning of a rate case and say we want a temporary rate increase.

It's just -- it's just -- there doesn't need to be any more facts in the case in order for that particular issue to be ripe. And it's ripe because the statute specifically allows for immediate judicial review

not only of a temporary rate increase but of a temporary rate decrease as well.

All the granting of this motion does is set a date for when temporary rate reduction calls a halt to continued overcharging. It takes away the utility incentive to prolong litigation in order to prolong its overcharge. It is important for the Court to grant this motion to protect consumers against being foreclosed from being compensated for overcharges that will occur during litigation.

...

Conclusions. Since the statute clearly allows the Courts to intervene when the PSC refuses to address a request for a temporary rate reduction or denies it, no reason exists for the Courts to give the PSC additional time to do what it should have done long ago to protect Montana ratepayers. Likewise, further delay via a suspension of proceedings at the PSC compounds the error.

Therefore, please:

- 1) deny NWE's motion to deprive complainants of their
Constitutional rights;
- 2) award costs and attorney's fees complainants incurred in
defending against it by revealing NWE's false quotations;
and
- 3) order a temporary rate decrease effective retroactively to May
30, 2010 (date Petitioner's Amended Complaint added

Barsantis and Grubas as co-petitioners); such rate reduction to be applied after additional hearing before the PSC and appointment of a special master to determine the exact amount of rebate that should be credited to the property tax assessed individual members of each affected SILMD.

Respectfully submitted,

August 13, 2012

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CERTIFICATE OF SERVICE

I, Russell L Doty, certify that on Monday, August 13, 2012, an accurate copy of the foregoing **Complainants' Response Opposing NWE's Motion to Suspend in Docket No. D2010.2.14** was served upon the parties listed below in the manner provided:

<input type="checkbox"/> US Mail <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Hand-delivery w/ 6 copies <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> E-mail:	Kate Whitney Montana Public Service Commn. 1701 Prospect Av PO Box 202601 Helena, MT 59620-2601 Email: kwhitney@mt.gov
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