

1 The Commission ordered briefing on the following issues:

2 **3a. On what basis do Michael and Frances Paterson have**
3 **standing as complainants in this matter in light of the Montana**
4 **Supreme Court decision *Williamson v. NWE*, 2012 MT 32?**

5
6 **PETITIONERS' RESPONSE:** None if the *Williamson* case was the only

7 consideration. However, *Williamson* does not make standing for Paterson's a moot
8 question. Now the Commission must confront the issue of equal application of its
9 statute to Patersons' petition for redress of grievances—a different issue than the
10 standing question addressed in *Williamson*.

11 It was pled (Complaint ¶s 11-15) and is indeed conceded that “Complainants
12 Michael W. Paterson and Frances E. Paterson do not live in any Special
13 Improvement Lighting & Maintenance District (SILMDs).” Thus, as the term
14 “directly affected” has been interpreted by the Commission for the initial
15 petitioners in *Williamson*, Michael and Frances Paterson would be determined to
16 be not “directly affected” by:

17 (a) any of the rates, tolls, charges, or schedules or any joint rate or rates
18 are in any way unreasonable or unjustly discriminatory;

19 (b) any regulations, measurements, practices, or acts whatsoever
20 affecting or relating to the production, transmission, delivery, or
21 furnishing of heat, light, water, power, or regulated
22 telecommunications service, or any service in connection therewith is
23 in any respect unreasonable, insufficient, or unjustly discriminatory;

24 or

25 (c) any service is inadequate. [Emphasis added.]

26
27 In *Williamson* the issue of whether or not the statutory interpretation given
28 to MCA § 69-3-321 by the Commission violated Montana's equal protection and
Complainants' Initial Brief -- Requested by PSC

1 right to petition for redress clauses (U.S. Const., First, Fifth & Fourteenth
2 Amendments; Mont. Const. Art. II §§ 4, 6 & 17) was not yet ripe because the
3 Court had not deferred to the Commission’s view of the statutory term “directly
4 affected.” In addition, the equal protection issue was not raised by complainants
5 during their appeals because they realized it had not been addressed in the
6 administrative agency. That issue is being addressed here by addition of Patersons
7 as parties the petition.

8 Whether or not the interpretation given § 69-3-321 by the Commission and
9 agreed upon by the Court violates equal protection as applied to the fundamental
10 right¹ to petition for redress is now ripe for review. Thus, since a fundamental right
11 is involved, the government has the burden of explaining what compelling state
12 interest requires the two different classifications of entities entitled to petition the
13 Commission. Since the PSC is part of the government, it is being given the
14 opportunity to defend its statute by elucidating any compelling state interest or

¹ The right to petition for redress of grievances is mentioned as a fundamental right in McDonald v. City of Chicago, Illinois, ___ U.S. ___, 130 S.Ct. 3020 (2010) by Justice Alito who noted:

These fundamental rights, according to the English tradition, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. See B. Bailyn, *The Ideological Origins of the American Revolution* 77-79 (1967). **These rights included many that later would be set forth in our Federal Bill of Rights, such as the right to petition for redress of grievances....**

1 rational basis that may exist for the unequal treatment of petitioners like Patersons
2 when they petition for rate reductions, etc.

3 Even if the strict scrutiny standard were not applied because the right to
4 petition is found not to be a fundamental one, there would be no rational basis for
5 an interpretation of § 69-3-321 that affords standing to one group (any mercantile,
6 agricultural, or manufacturing society or club; by any body politic or municipal
7 organization or association) who is not directly affected, but only “interested,” but
8 denies standing to a different group (any person, firm, or corporation) who are not
9 “directly affected.” Complainants contend there is no rational basis, let alone a
10 compelling state interest in the invidious discrimination between the customer
11 classes referenced in § 69-3-321.

12 That is why complainants also pled

13 14) Complainants Michael W. and Frances E. Paterson share as part
14 of their property tax bill in the street lighting costs the city of
15 Billings and Yellowstone County pay.

16 15) Complainants Michael W. and Frances E. Paterson would have
17 standing to bring this matter before the Commission pursuant to
18 MCA § 69-3-321 as “interested persons” if the statute were not
19 written in an unjustly discriminatory manner to require them to
20 be directly affect by certain actions, a hoop other entities do not
21 have to jump through in order to have their grievances redressed
22 by the Commission.

23
24 MCA § 69-3-321 creates two classes of entities who are entitled to bring a
25 complaint to the Commission. One class involves “any mercantile, agricultural, or
26 manufacturing society or club; by any body politic or municipal organization or

1 association.” The second class of entities encompasses “any person, firm, or
2 corporation.” There are additional requirements for each class. The additional
3 requirement for members of the first class is that the entity must be “interested.”
4 The additional requirement for the second group is different. That is, a member of
5 the second group must be “directly affected.”²

6 In summary, if the phone company in *Mountain States Tel. & Tel. Co. v.*
7 *Department of Public Service Regulation*, 634 P.2d 181, 194 Mont. 277 (Mont.
8 1981)³ was entitled to equal protection of trade secrets, Paterson’s are entitled to
9 laws that afford them equal access to petition for redress pursuant to Mont. Const.
10 Art. II, § 6, equal access to bring their plea against street lighting overcharges and
11 for more efficient lighting before the Commission as if they were in the same class
12 of entities who only have to be “interested” in order to have their claim
13 adjudicated.

14 Further, this Commission is not entirely bound by the interpretation that its
15 predecessor Commission gave to MCA § 69-3-321. That is, if there is a compelling

² (1) The commission shall proceed, with or without notice, to make such investigation as it may deem necessary upon a complaint made against any public utility by any mercantile, agricultural, or manufacturing society or club; by any body politic or municipal organization or association, the same being interested; or by any person, firm, or corporation, provided such person, firm, or corporation is directly affected thereby....

³ This case was partially overruled at 82 P.3d 876 (Mont. 2003), 02-301, Great Falls Tribune v. Montana Public Service Com'n. However, the subsequent ruling did not appear to eliminate the equal protection applied to the phone company, only to modify how its intellectual property would enjoy such protection.

1 basis for a different interpretation, this Commission could make a different
2 determination, just as a Court may occasionally overturn prior rulings as was done
3 in *Brown v Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).
4 Thus, if this Commission decides that persons who pay taxes generally to a city
5 that is being overcharged for its share of street lighting are directly affected
6 because a component of their property taxes involves paying for that lighting, such
7 a ruling would afford standing to the Patersons.

8 Or alternatively this Commission could rule that as they drive on Billings
9 streets at night the Patersons (and their aging eyes) are directly affected by the
10 poorer quality of light emitting from high pressure sodium luminaires. The basis
11 for that determination would stem from the fact that LED luminaires emit more
12 light in the scotopic and mesopic light spectrums as well as the photopic spectrum
13 of light emitted by HPS luminaires. The additional light emitted by LEDs makes it
14 easier to see at night under LED light. Then this Commission could determine that
15 it is wiser in these matters than its predecessor.

1 **3b. Commission staff has concluded that a complaint may be filed**
2 **pursuant to Mont. Code Ann. § 69-3-321 but that Mont. Code**
3 **Ann. §§ 69-3-301 and -304 and ARM 38.5.8218 do not serve as a**
4 **basis on which a complaint may be based. If you disagree with**
5 **staff's conclusion, briefly explain how Mont. Code Ann § 69-3-**
6 **301 and -304 and ARM 38.5.8218 can serve as a basis for**
7 **Complainants' claims in the Second Amended Complaint?**

8 **PETITIONERS' RESPONSE: All of the Commission's regulatory**
9 **statutes must be considered as part of a comprehensive regulatory scheme.**
10 **That has been Montana law for a century. See MCA § 69-3-102, which states:**

11 **The commission is hereby invested with full power of supervision,**
12 **regulation, and control of such public utilities, subject to the provisions**
13 **of this chapter and to the exclusion of the jurisdiction, regulation, and**
14 **control of such utilities by any municipality, town, or village. [Emphasis**
15 **added]**

16 Thus, MCA §§ 69-3-321, § 69-3-301, and 69-3-304 are provisions of
17 chapter 69 which the Commission directed by statute to utilize when regulating
18 utilities.

19 As noted by Commission staff, the complaint is correctly filed pursuant to
20 MCA § 69-3-321 as pled. That statute references three of the reasons why the
21 complaint was filed, namely petitioners are directly affected by:

- 22 A) ... rates, tolls, charges, or schedules or any joint rate or rates [that] are ...
23 unreasonable or unjustly discriminatory;
24 B) any ... practices, or acts whatsoever affecting or relating to the production,
25 transmission, delivery, or furnishing of ... light, ...or any service in
26 connection therewith [that are] ... in any respect unreasonable, insufficient,
27 or unjustly discriminatory; or
28 C) [street lighting]... service [that] is inadequate. [Bracketed material inserted
29 for clarity.]

1 However, the regulatory framework does not stop end with MCA § 69-3-
2 321. Because MCA § 69-3-321(a) references street lighting rates that are
3 unreasonable and unjustly discriminatory, MCA §§ 69-3-301 and 69-3-304 also are
4 brought into play.

5 MCA § 69-3-301 directs NorthWestern to file rates. It is the provision that
6 applies once the Commission has prescribed rates that are reasonable and just. It
7 requires those rates to be filed and made available to the public. Since the rates
8 Northwestern is directed to file by MCA § 69-3-301 must be reasonable and just,
9 MCA § 69-3-301 is brought into play because it is part of the statutory framework
10 requiring the filing of not only rate schedules but listing of other practices relating
11 to provision of street lighting service.

12 One purpose of MCA § 69-3-301 is to make understandable rate schedules
13 available to the customer. NorthWestern's present street lighting rate schedule is so
14 completely deficient that even previous Commissioners and their staffs have not
15 been able to understand the street lighting rates in that schedule posted pursuant to
16 MCA § 69-3-301. Hence petitioners propose to remedy that deficiency by
17 requesting the Commission to utilize its authority requiring the posting of
18 understandable, just and reasonable rates to require NorthWestern:

- 19 **D) ... to include in its bills to all ELDS-1 customers:**
20 **a. The date when the ownership charge shall have fully paid for the**
21 **facilities it is being applied to;**
22 **b. The date when the ownership charge shall cease;**

1 **c. The per lighting unit original cost of any new LED or other**
2 **installation that an ownership charge is being applied to;**
3 **E) ...to provide to a city or other entities, including but not limited to**
4 **affected property owners, taking new street light service involving an**
5 **ownership charge, the average per unit (street light) original cost of all**
6 **facilities involved in calculating the ownership charge, the name of each**
7 **item involved in the ownership charge calculation, and an itemized list**
8 **of all costs involved in determining the ownership charge.**
9

10 NorthWestern has been less than forthcoming in explaining exactly what
11 facilities or parts of street lighting facilities are paid for by its ownership charge.⁴ It

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

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

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

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

Really? NorthWestern is unsure about what definition the term “customer” should be use when discussing street lighting? How about the one NorthWestern sends the bill for street lights to?

Complaint Paragraph 38 alleged: “Once it has determined the average total per-unit cost of a street light, to determine the Ownership charge, Northwestern looks to see what cost range that installation falls in on Schedule No. ELDS-I and places the unit (or units) in the proper “Cost Range.”

NorthWestern responded: “NorthWestern admits that the ownership charge is calculated by consulting the applicable tariff to determine the proper “Cost

- 1 has resisted explaining exactly how it calculates the original cost of street lighting
2 infrastructure in its rate base,⁵ how many years are involved in depreciating that

Range." NorthWestern is without sufficient knowledge to admit or deny all other material allegations contained in this paragraph and therefore denies the same.

Complaint Paragraph 39 alleged: "Once the unit to be provided to Northwestern's customer has been placed in the proper "Cost Range," and the street light is operational, Northwestern begins to charge the customer a monthly unit rate ownership charge associated with the "cost range" specified in Schedule No. ELDS-1.

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

Vague is it? More obfuscation by NorthWestern. Why would it matter if there were more than one type of defined customer than the one receiving street lighting service? NorthWestern would still charge a "customer a monthly unit rate ownership charge associated with the "cost range" specified in Schedule No. ELDS-1," correct?

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

NorthWestern responded: "NorthWestern denies."

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

NorthWestern responded: "NorthWestern admits that it has a depreciation schedule for street lights but denies all other allegations in this paragraph."

OK, so how many years are involved in the depreciation schedule for street lights and how many years does it take for the ownership charge to pay for the infrastructure in each street lighting category?

⁵ The statute requiring original cost valuation of street lights is MCA § **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**

1 rate base, and whether the tariff rate level applied to the charge for street lighting
2 service is synchronized with the depreciation schedule so that an overcharge is not
3 collected. Unless it can do that, NorthWestern cannot know the proper amount to
4 book in the street lighting rate base account and the proper amount to subtract from
5 rate base once the ownership charge defrays the original cost depreciated plus an
6 allowable rate of return on the booked value.

7 Therefore, to bring clarity to the assessment of ownership charge issue, for
8 Billings SILMDs # 261, 262 & 228, NorthWestern must bear the briefing burden
9 that now shifts to it by detailing the process from start to finish of exactly how the
10 street lighting infrastructure is valued; how the ownership charge is determined and
11 assigned to the City of Billings and its residents of an SILMD; and how the value
12 is added to and subtracted from NorthWestern's rate base? Also, NorthWestern
13 must brief the number of years involved in the depreciation schedules to which
14 these street lights or any component of them is assigned and define "customer" and
15 any other term necessary to carry its burden of going forward with the evidence in
16 a way that is consistent with the law. Complainants have pled how long the lights

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. In making the investigation, the commission may avail itself of all information contained in the assessment rolls of various counties or in the public records of the various branches of the state government or of any other information obtainable, and **the commission may at any time on its own initiative make a revaluation of the property.**" [Emphasis added]

1 in SILMDs 261, 262 & 228 have been in service and pled specifically how the
2 misapplication of the ownership charge has resulted in collection of revenues that
3 allow for recovery of street lighting costs by NorthWestern in excess of original
4 cost. If those calculations are not correct, now is the time for NorthWestern to
5 demonstrate in its responsive brief why that is not the case.

6 It is not enough for NorthWestern to say that it was only charging according
7 to approved tariffs. If NorthWestern misapplied the tariff so it could continue
8 charging for street lighting infrastructure beyond the time that the tariff rate
9 covered the original cost of street lights in a SILMD, then that application of the
10 tariff was in violation of the statute and hence was void *ab initio*. Further, it could
11 not have been an approved tariff because the Commission had no authority to
12 approve a tariff that allowed for recovery of utility plant costs in excess of original
13 cost. Such unauthorized approval if it happened would have been an *ultra vires* act.

14 If NorthWestern fails to brief this question clearly in its response, the ¶ 29,
15 36, 38, 39, 40 & 118 complaint allegations should be deemed admitted. And if
16 NorthWestern fails to provide the information with regard to Billings SILMDs #
17 261, 262 & 228, complainants request the Commission to use its subpoena power
18 pursuant to § 69-3-106(3) to obtain this information subject to application of § 69-
19 3-206 and other sanctions for non-compliance.

20 **MCA § 69-3-304 authorizes the Commission to set temporary rate**
21 **increases or decreases. Since this statute provides a basis for the temporary**

1 rate increase recently granted NorthWestern, it also provides a basis to grant
2 a temporary rate decrease sought by complainants. Any other interpretation
3 would deny equal protection (guaranteed by Mont. Const. Art. II § 4) to those
4 seeking a rate decrease when on several occasions a temporary rate increase
5 has been approved for the utility.

6 The rate decrease sought is narrowly crafted to stop the hemorrhaging of
7 funds collected after the original cost of street lighting infrastructure has been
8 recovered by NorthWestern. The pleadings have demonstrated mathematically,
9 instances in many Billings SILMDs where application of the ownership charge has
10 gone on far beyond a time when those charges have recovered the original cost
11 plus allowed rate of return on street light investments. Since by law, NorthWestern
12 is not entitled to recover more than its original cost, the rate decrease request
13 should be granted for those SILMDs and similar SILMDs where the lights have
14 been installed for a sufficient time (as demonstrated in Complaint ¶ 46 and Tables
15 1a & 1b) so that the ownership charge will have paid for the original cost of the
16 street lights plus the allowed rate of return.

17 **ARM 38.5.8218⁶** requires utilities to “optimize the acquisition of demand-
18 side resources” by implementing energy conservation. Petitioners base their

⁶ **38.5.8218 DEMAND-SIDE RESOURCES**

(1) Energy efficiency and conservation measures can effectively contribute to serving total electricity load requirements at the lowest long-term total cost. A utility should develop a comprehensive inventory of all potentially cost-effective

1 complaint on this rule by contending NorthWestern has failed to optimize the
2 acquisition of demand-side resources with regard to implementing LED street
3 lighting within its service area. Therefore NorthWestern has not done what is
4 required by ARM 38.5.8218.

demand-side resources available in its service area and **optimize the acquisition of demand-side resources** over its planning horizon.

(2) A utility should evaluate the cost-effectiveness of demand-side resources and programs based on its long-term avoidable costs. Cost-effectiveness evaluations of demand-side resources should encompass avoidable electricity supply, transmission, and distribution costs.

(3) A nonparticipant (no-losers) test considers utility-sponsored demand-side management programs cost effective only if rates to customers that do not participate in the program are not affected by the program. A utility should not evaluate the cost-effectiveness of demand-side resources using a nonparticipant test.

(4) A utility should develop and strive to achieve targets for steady, sustainable investments in cost-effective, long-term demand-side resources. A utility's investment in demand-side resources should be coordinated with and complement its universal system benefits activities.

(5) Except when the entire resource would otherwise be lost, a utility's demand-side management programs should not be focused on "cream skimming;" the least expensive and most readily obtainable resource potential should be acquired in conjunction with other measures that are cost-effective only if acquired in a package with the least expensive, most readily available resources.

(6) Prudently incurred costs related to procuring demand-side resources are fully recoverable in rates. The commission will evaluate the prudence with which demand-side resources are procured, including resources acquired through programs, subcontractors, and competitive solicitations consistent with evaluations of supply-side resources.

(7) A utility's development of demand-side resources should include an examination of innovative methods to address cost recovery issues related to demand -side resource investments and expenses, including undesirable effects on revenues related to the provision of transmission and distribution services.

[emphasis added]

1 To illustrate how far behind NorthWestern is in optimizing the acquisition of
2 demand-side street lighting resources one only need see that as of May 16, 2013,
3 NorthWestern has done almost nothing, while the city of Los Angeles has installed
4 133,584 LED street lights which are reducing street light energy demand by 63.3%
5 (18,457 kW) in areas where replacements have been made. LA's LED street lights
6 are producing an annual reduction of energy needed by 75.30GWh and are saving
7 Los Angeles \$6,709,702 a year in energy costs. The city is also expecting a
8 substantial reduction in maintenance costs as well.⁷ Many other cities using LED
9 street lighting may be found at: <http://newstreetlights.com/> and
10 <http://www.ledcity.org/>

11 To help NorthWestern meet its ARM § 38.5.8218 obligations, the
12 Commission is asked to require the utility to become a member of the The
13 Municipal Solid-State Street Lighting Consortium:
14 <http://www1.eere.energy.gov/buildings/ssl/consortium.html> . Membership is free.
15 As of May 28, 2013, hundreds of towns and public utilities, from every state
16 except Montana, the Dakotas, and Kentucky, who are members of the Consortium
17 share information on testing and experience with the luminaires they have
18 installed. Since NorthWestern Energy has not made voluntary use of this important
19 resource, requiring it to do so is appropriate.

⁷ http://bsl.lacity.org/downloads/led/LED_Energy_Savings_051613.pdf

1 **3c. Based on what authority can the Commission order a refund**
2 **of previously collected “ownership charges” that were collected**
3 **pursuant to PSC-approved electric lighting tariff? (See**
4 **paragraph J on page 4 of the Second Amended Complaint.)**

5
6 **PETITIONERS’ RESPONSE:** While the PSC approved the tariff under
7 which NorthWestern is purportedly collecting street lighting revenues, the
8 PSC did not approve the twisted application of that tariff so as to result in an
9 overcharge—nor could the PSC have done so legally, either by design or
10 omission. Why? Because MCA § 69-3-109 requires valuation of utility
11 property that “may not exceed the original cost of the property.”⁸ See *Petition*
12 *of Montana Power Co. for Increased Rates and Charges in Gas and Elec.*
13 *Services*, 180 Mont. 385, 394 (Mont. 1979), 590 P.2d 1140, 1145 where in
14 eliminating \$5.7 million from Montana Power’s previously approved rate base
15 the Supreme Court opined:

16 This statute is dispositive of this issue. Under it, the Commission is
17 obligated to eliminate from rate base all utility costs in excess of original
18 cost.

19
20 **If, as complainants allege, the ownership charge has been applied in a**
21 **manner that allows NorthWestern to collect revenues in excess of recovering**

⁸ Paragraph 25 of the Complaint pled “Montana law requires NorthWestern to use the original cost depreciated method of calculating the value of utility property placed into its utility rate base.”

NorthWestern’s answer to that statement was, “NorthWestern states that the law speaks for itself.” So in effect, NorthWestern has admitted that in speaking for itself, MCA § 69-3-109 requires valuation of utility property that “may not exceed the original cost of the property.”

1 the original cost of its street lights, then the law has been and is being
2 broken—for rate/taxpayers in one SILMD the overcharge has gone on for in
3 excess of 18 years.

4 MCA § 69-3-109 also provides “the commission may at any time on its
5 own initiative make a revaluation of the property.” So the Commission should
6 revalue the street lighting rate base so that within each SILMD the charges do not
7 exceed reimbursement beyond the original cost of the street lighting property and
8 order restitution for the overcharge.⁹ Any other course allows NorthWestern to
9 benefit from its own wrongdoing in taking unfair advantage of complicated utility
10 ratemaking by being less than forthright when booking its street lighting
11 infrastructure and adjusting the amount booked when the actual tariffs applied have
12 covered the original cost.

13 The sin lies not in the approved tariff per se, but in its deceptive
14 misapplication by NorthWestern. That deception continues. Even now, nowhere in
15 this lawsuit or the requested rulemaking and pre-amended complaint proceeding
16 that have preceded it has NorthWestern fully explained how it applies its
17 ownership charge or fully admitted to what is alleged about how and how long that
18 ownership charge is applied.

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

⁹ A refund should be ordered for times predating the Montana Power bankruptcy because debts arising as a result of certain actions of the bankrupt akin to fraud or other misbehavior are not wiped out by a bankruptcy.

1
2 **Section 16. The administration of justice.** Courts of justice shall be open
3 to every person, and speedy remedy afforded **for every injury of person,**
4 **property,** or character. . . . Right and **justice shall be administered without**
5 **sale, denial, or delay.** [Emphasis added.]
6

7 In this case an injury to property has taken place every time NorthWestern's
8 ownership charge was continually assessed by NorthWestern beyond the time
9 when the street lighting infrastructure in a SILMD had been completely paid for.
10 Said another way: After a long and arduous battle, in 1975 Montana joined other
11 states in adopting original cost depreciated rate base ratemaking. That means a
12 utility gets to charge only enough to cover paying off the original cost of utility
13 property plus an allowed rate of return. When utility plant is completely
14 depreciated (i.e., paid for) it drops out of the rate base and utility customers no
15 longer have to pay for it. They do, however continue to pay for the costs of
16 supplying energy through the depreciated property and for maintenance of it.

17 In this case, NorthWestern designed its tariffs to pay off the cost of its
18 infrastructure in 10 to 15 years (in most lighting categories) while simultaneously
19 placing the street lights on roughly a 30 year depreciation schedule. By
20 mismatching the depreciation schedule and the tariff, the utility made it appear as
21 if more of its property remained qualified to be in the rate base than was actually
22 the case.

1 **Restitution** for excessive charges was ordered in a protracted case involving
2 District of Columbia transit fares.¹⁰ In 1968, the DC Circuit Court set aside three
3 DC transit Commission orders increasing transit's fares and ordered the company
4 to make restitution to the bus riders in the Washington metropolitan area for
5 excessive fares collected. See *Williams v. Washington Metro. Area Transit*
6 *Comm'n*, 415 F.2d 922, 938-43 (D.C.Cir.1968), cert. denied, 393 U.S. 1081, 89
7 S.Ct. 860, 21 L.Ed.2d 773 (1969); see also *Bebchick v. Washington Metro. Area*
8 *Transit Comm'n*, 485 F.2d 858, 860-61 (D.C.Cir.1973) (*Bebchick II*).¹¹ In 1974,
9 representatives of the bus riders sought to collect the restitution due them from
10 condemnation proceeds belonging to D.C. Transit then under the control of the
11 United States District Court for the District of Columbia. In an order dated
12 December 19, 1974, the district court distributed to D.C. Transit all but \$1,461,756
13 of the condemnation proceeds, retaining that amount in an account until all appeals
14 of the restitution award were settled.

¹⁰ This series of litigation began with *Bebchick v. Public Utilities Comm'n*, 318 F.2d 187 (D.C.Cir.) (in banc), cert. denied, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963) (*Bebchick I*); *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Comm'n*, 350 F.2d 753 (D.C.Cir.1965) (in banc).

¹¹ See also *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Comm'n*, 485 F.2d 786 (D.C.Cir.1973) (D.C.C. I), and *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Comm'n*, 485 F.2d 886 (D.C.Cir.1973) (D.C.C. II). Certiorari was denied in D.C.C. I and D.C.C. II in 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974).

1 In 1975, the DC Circuit Court assumed custody of the account containing
2 the withheld condemnation proceeds, known as the "Bebchick Fund." **In 1979, all**
3 **appeals of the restitution award became moot when D.C. Transit agreed that**
4 **the bus riders were entitled to the Bebchick Fund as restitution for excessive**
5 **fares it had charged them.**¹² By 1986, all issues regarding the restitution owed the
6 bus riders in connection with the excessive fares had been settled. See *Bebchick v.*
7 *Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 399-401 (D.C.Cir.1986).
8 *Democratic Central Committee of the District of Columbia v. Washington*
9 *Metropolitan Area Transit Comm'n*, 84 F.3d 451 (D.C. Cir. 1996).

10 **Further, interest on restitution of NorthWestern's overcharge should be**
11 **at same rate that NWE allowed on its rate base to prevent unjust enrichment.**
12 See *Frederick County Fruit Growers Assoc., Inc., et al. v. Martin*, 968 F.2d 1265,
13 1275 (D.C. Cir. 1992).

14 **3d. Pursuant to what authority can the Commission order**
15 **NorthWestern Energy to use a specific type of equipment, such**
16 **as LED technology, in street lighting districts?**

17
18 **PETITIONERS' RESPONSE: MCA § 69-3-306(1) allows such a**
19 **classification:**

20
21 **Classification of service.** (1) The commission may prescribe
22 classifications of the service of all public utilities. Such classifications may
23 take into account the quantity used, the time when used, and any other

¹² *Bebchick v. Washington Metropolitan Area Transit Comm'n*, 645 F.2d 1086 (D.C.Cir.1981) (Bebchick III).

1 reasonable consideration. Each public utility is required to conform its
2 schedule of rates, tolls, and charges to such classifications.

3
4 **Also see MCA § 69-3-1202:**

5 **Policy -- planning.** (1) It is the policy of the state of Montana to
6 supervise, regulate, and control public utilities. To the extent that it is
7 consistent with the policy and in order to benefit society, the state
8 encourages efficient utility operations, efficient use of utility services, and
9 efficient rates. **It is further the policy of the state to encourage utilities to
10 acquire resources in a manner that will help ensure a clean, healthful,
11 safe, and economically productive environment.**

12 (2) The legislature finds that the commission may include in rates the
13 costs that are associated with acquiring the resources referred to in
14 subsection (1) and that are consistent with this policy if the resources are
15 actually used and useful for the convenience of the public. To advance this
16 policy, the commission may require periodic long-range plans from utilities
17 that provide electric and natural gas service in a form and manner
18 determined by the commission. The commission may receive comments on
19 the plans.

20 (3) This part does not constrain or limit the commission's existing
21 statutory duties or responsibilities.

22
23 Since LED street lights will help ensure a clean, healthful, safe, and
24 economically productive environment, as provided for in MCA § 69-3-1202, the
25 Commission may order use of LED technology. Mont. Const. Art. II, § 3 & Art.
26 IX, § 1;¹³

¹³ Mont. Const. Art. IX, § 1 provides in relevant part:

(1) The State **and each person** shall *maintain and improve* a clean and healthful environment in Montana for present and future generations.

....

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system *from degradation* and provide adequate remedies to *prevent unreasonable depletion and degradation* of natural resources. [Emphasis added].

1 Further, the failure to order more efficient technology would have to be
2 driven by a compelling state interest justifying the refusal to do so. See *MEIC v.*
3 *DEQ*, 1999 MT 248, ¶¶ 6, 25, 47, 48, 63, 64, 76, 79 & 80, 296 Mont. 207, 988
4 P.2d 1236, which required a strict scrutiny test when protection of the fundamental
5 rights contained in Mont. Const. Art. II, § 3 & Art. IX, § 1 is at risk.

6 In this case the public has a constitutionally protected fundamental right to
7 protection from adding unnecessary greenhouse gases to the atmosphere—gases
8 that are regularly degrading the environment by helping to overheat it, as well as
9 protection from the unnecessary addition of other air pollutants.

10 It would be a valid exercise of the police power to require LED technology.
11 In *Miller v. Schone*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), the Court
12 was called upon to rule on the constitutionality of the Virginia Cedar Rust Act
13 which provided for the destruction of cedar trees suffering from cedar rust, not
14 because of a threat to cedar trees, but because it threatened apple trees. In
15 upholding the statute, the Court held, at 279-280:

16 Where the public interests involve preferment of that interest over the
17 interest of the individual, to the extent even of its destruction, is one of the
18 distinguishing characteristics of every exercise of police power which affects
19 property.

20
21 Complaint paragraph 93 asks the PSC “to take administrative notice of its
22 1982 order for the fact that it allowed Montana Power 7 years to complete the
23 transition to HPS street lights.” Since in 1982, the PSC had authority to order use

1 of a specific type of equipment (HPS lights that were more efficient than those
2 previously in use), it has that authority now to order LED implementation.

3 If at the time it was first requested, this Commission had implemented a rule
4 concerning LEDs and allowing the use of NorthWestern's poles to house them,
5 Montana cities would have benefited in the same way as many cities that were able
6 to use Economic Recovery Act funding to install LED lighting. For example,
7 Foster City, California, used \$157,000 from the Conservation Block Grant
8 Program (ECBG) & \$33,825 from Pacific Gas & Electric demand side resource
9 conservation program rebates to install 269 LEDs. Because it doesn't have to repay
10 the grant or rebate, Foster City will netted \$19,483 in first year avoided
11 maintenance and energy cost savings. Even if Foster City had to pay for the LEDs
12 itself, the savings would still defray the costs within eight years of installation.

13 Cody, Wyoming, also used ECBG funding to replace all 1200 of its lights,
14 saving about \$110,000 a year.

15 Detroit Edison, an investor owned utility, also is allowing Ann Arbor to
16 place LED street lights on utility-owned poles.

17 **3e. Pursuant to what authority can the Commission require**
18 **NorthWestern to develop a technology-specific charge within the**
19 **electric lighting tariff, as contemplated in L on page 5 of the**
20 **Second Amended Complaint?**

21

1 **PETITIONERS' RESPONSE: MCA § 69-3-302 empowers the**

2 **Commission to set rates and MCA § 69-2-101 empowers it to adopt rules for**

3 **setting those rates.** Some utilities, like NorthWestern Energy, do not have

4 unmetered rates for LED street lights that allow customers to take advantage of the

5 fact that LED street lights use less energy than the conventional (yellow light) high

6 pressure sodium (HPS) fixtures now in use.

7 NorthWestern does however have an unmetered tariff for HPS street lights.

8 That “technology-specific” charge is now being levied on the great majority of

9 unmetered street lights that are either owned by NorthWestern or by a municipality

10 buying street lighting power from NorthWestern. The same authority that allows

11 the Commission to set unmetered tariff for NorthWestern’s HPS luminaires also

12 allows the Commission to set an unmetered tariff for LED luminaires.

13 It is not hard to develop an unmetered tariff (i.e., rate) for street lights. Some

14 utilities already have them. See for example Pacific Gas & Electric's (PG&E's)

15 tariff at

16 http://www.pge.com/tariffs/tm2/pdf/ELEC_SCHEDS_LS-1.pdf (for utility-

17 owned lights) and

18 http://www.pge.com/tariffs/tm2/pdf/ELEC_SCHEDS_LS-2.pdf (for

19 customer-owned lights).

1 That tariff has unmetered rates for several specific types of equipment
2 including LED technology, high and low pressure sodium, metal halide,
3 incandescent, mercury vapor, and induction lighting.

4 That tariff sets out the following formula for determining monthly energy
5 charge per lamp: "Monthly energy charges per lamp are calculated using the
6 following formula: (Lamp wattage + ballast wattage) x 4,100 hours/12
7 months/1000 x streetlight energy rate per kilowatt hour (kWh). Ballast wattage =
8 ballast factor x lamp wattage."

9 If NorthWestern requires an LED street light and ballast to test, it should
10 waive the test if the LED lighting manufacturer provides IES files and wattage
11 tests of luminaires done by independent testing laboratories. All reputable LED
12 street light manufacturers will be able to supply the needed data. For example, you
13 can get the needed data for the BetaLED fixtures at [http://www.betaled.com/us-](http://www.betaled.com/us-en/TechnicalLibrary/TechnicalDocuments/Ledway-streetlights.aspx)
14 [en/TechnicalLibrary/TechnicalDocuments/Ledway-streetlights.aspx](http://www.betaled.com/us-en/TechnicalLibrary/TechnicalDocuments/Ledway-streetlights.aspx)

15 NorthWestern insists on testing for itself, the manufacturer should be able to
16 lend them a luminaire. The test shouldn't take long. Just hook the luminaire to
17 power with a metering device in the loop to verify the rated wattage. To learn more
18 about how to figure electric energy usage see

19 <http://michaelbluejay.com/electricity/cost.html>

20 To check for LEDs that have been tested and approved for rebates and
21 inclusion in a tariff, check out the [lights that PG&E has precertified for a rebate at](#)

1 <http://www.aesc->
2 [inc.com/download/SPC/2011SPCDocs/UnifiedManual/App%20E%20Approved%](http://www.aesc-inc.com/download/SPC/2011SPCDocs/UnifiedManual/App%20E%20Approved%20LED%20Lighting.pdf)
3 [20LED%20Lighting.pdf](http://www.aesc-inc.com/download/SPC/2011SPCDocs/UnifiedManual/App%20E%20Approved%20LED%20Lighting.pdf)

4 The street lighting tariff ought to include a charge for utility owned poles
5 and lights, owner-owned poles and lights, and for owner-owned luminaires on
6 utility-owned poles. Reputable utilities will allow their poles to house new
7 luminaires owned by a city. If the poles and old style luminaires have not yet been
8 fully paid for, there may be a slight charge for pole use until the cost of the poles
9 and existing light fixtures has been defrayed. Some utilities, PG&E included, allow
10 cities to use their poles if they sign a contract. For example, PG&E has the
11 following wording at page 15 of its LS-2 tariff linked above:

12 "13. POLE CONTACT AGREEMENT: Where Customer requests to have a
13 portion or all Customer owned street lighting facilities in contact with
14 PG&E's distribution poles, a Customer-Owned Streetlights PG&E Pole
15 Contact Agreement (Form 79 938) will be required."

16 Federal law requires utilities to allow the use of their poles and wires to
17 transmit electricity to competing end users. See Ottertail Power Company v. US,
18 35 L.Ed.2d 359, 93 S.Ct. 1022, 410 U.S. 366 (1973) and a lower court ruling in
19 Ottertail Power Co. v. FPC, 536 F.2d 240 (1976). Northwestern has to allow LEDs
20 that are compatible with its system. Montana's Territorial Integrity law allows it,
21 by providing:

1 69-5-107. Customer-owned facilities. This part may not limit a
2 customer's right to construct, own, or operate electric service facilities for
3 the customer's own use, and construction, ownership, or use may not cause
4 the customer to be considered a utility. A customer may not duplicate
5 existing electric service facilities.

6 The tariff should not be limited to street lights. A federal study of LED lights
7 installed in parking lots at Raley's Supermarket in Sacramento, California
8 documented a 70% energy savings. If Raley's had not installed LEDs, it would
9 have blown-off \$2,300 per luminaire in unnecessary energy costs over a 15 year
10 period.

11 **3f. Pursuant to what authority can the Commission order**
12 **NorthWestern Energy to amend contracts referred to in**
13 **paragraph G on page 4 of the Second Amended Complaint?**

14 **PETITIONERS' RESPONSE: Public utility corporations and their**
15 **contracts are subject to the Police Power of the State.**

16 Public utility corporations are organized under a grant of authority from the
17 corporate law of Montana or another state of incorporation, and operate under the
18 continuing right of Montana to supervise and regulate them. **MCA § 69-3-102**
19 **provides: "The commission is hereby invested with full power of supervision,**
20 **regulation, and control of such public utilities....**

21 Montana law and NorthWestern contracts both provide for Commission
22 approval of contracts.
23

1 Paragraph 27 of the Complaint pled: “All of the contracts for street lighting
2 between Billings and Respondent make the charges under each contract subject to
3 PCS approved street lighting tariffs.”

4 NorthWestern’s answer to that statement was, “NorthWestern is without
5 sufficient knowledge to admit or deny that all of its contracts with the City of
6 Billings have the alleged provision, but does admit that some of its contracts with
7 the City of Billings contain such a provision.”

8 A computer search of the PDF file of street lighting contracts indicates they
9 all have a clause subjecting the contracts to PSC approval. NorthWestern cannot
10 provide a street lighting contract where that is not the case. Indeed it would be hard
11 to imagine that such a clause were not in all contracts since that procedure is
12 required by law and NorthWestern frequently resorts to the claim that the PSC
13 governs rates and service whenever an attempt is made to address street lighting
14 rate and service issues before the Billing City Council or other municipal entity.

15 Even though utilities are bound by contract, franchise, and law to provide
16 reasonably adequate service and facilities, this phase of their business operation is
17 no less subject to control than any other phase in their existence as a public utility
18 corporation regulated by statute.

19 Whether a private company or public company, utilities for example, cannot
20 protect uses of natural gas which may be found wasteful by alleging that they are
21 covered by contract.

1 Where matters affect the public safety, health, welfare and morals, or
2 well being, they (complainants who had contracted with carbon-black
3 company) may not by contract be placed beyond the power of the State to
4 regulate and control them. The argument defeats itself. If it were conceded
5 to be true, any individual could by contract place his business or property
6 beyond the realm of the police power. (Parenthesis supplied) *Henderson Co.*
7 *v. Thompson*, 14 F. Supp. 328, 334 (1936).

8
9 The Montana Commission has used the police power to require utilities and
10 their customers to file gas energy conservation plans and to conserve natural gas by
11 curtailing usage by 10%. See ARM §§ 38.6.201 and 38.6.202 which I wrote in
12 1975. The statutes authorizing that rule have been renumbered to 69-3-102, 69-3-
13 203, 69-3-108, 69-3-306 and 69-3-106.

14 On this matter U.S. Supreme Court Chief Justice Hughes stated in *Home*
15 *Building & Loan Assn. v. Blaisdell*, 189 Minn. 422, 425, 249 N.W. 334, Aff'd. 290
16 U.S. 398, 435, 54 S.Ct. 231, 78 L.Ed. 255 (1933):

17 Not only are existing laws read into contracts in order to fix
18 obligations as between the parties, but the reservation of essential attributes
19 of sovereign power is also read into contracts as a postulate of the legal
20 order.

21
22 And Hughes went on to quote from an earlier Supreme Court case:

23 'But into all contracts, whether made between States and individuals,
24 or between individuals only, there enter conditions which arise not out of the
25 literal terms of the contract itself; they are superinduced by the pre-existing
26 and higher authority of the laws of nature, of nations or of the community to
27 which the parties belong; ... Every contract is made in subordination to them,
28 and must yield to their control, as conditions inherent in and paramount,
29 whenever a necessity for their execution shall occur.' Ibid, 435, 436, quoting
30 Justice Brewer, *Long Island Water Supply Co. v. Brooklyn*, 166 US 685,
31 692.

1 The fact that utilities enter into contracts and secure franchises with local
2 governments and others is no shield to intervention by the State Public Service
3 Commission in the interests of the general welfare or the prevention of waste of
4 non-replenishable natural resources.

5 In Montana, the precedent was established by 1918 that the Public Service
6 Commission could exercise its power even if it meant the changing of a contract
7 entered into prior to the Commission's creation. The Montana Supreme Court said
8 a franchise contract made in 1912 between a city and a gas company must be
9 presumed to have been entered into with knowledge that the state could thereafter
10 enact legislation in 1913 toward exercising the power of rate regulation reposed in
11 it, and thus change the rate fixed by contract. The act creating the Public Service
12 Commission was not open to attack on the ground that it impaired the obligation of
13 the contract made the year before. *State ex rel. City of Billings v. Billings Gas Co.*,
14 55 Mont. 102, 111, 173 P. 799 (1918), distinguished in 99 Mont. 465, 478, 44 P.
15 2d 735 (1935).

16 The Federal Power Commission (forerunner to FERC) also routinely issued
17 orders pursuant to the police power which were Okayed even if existing contract
18 rights were affected. For example, in Docket No. RM 74- 8, Order No. 498 (issued
19 December 21, 1973), the United States Federal Power Commission quoted an
20 earlier order, Order No. 431, issued April 15, 1971, in Docket No. R-418, 45 FPC
21 570, promulgating Section 2.70 of its General Policy and Interpretations, 18 CFR

1 2.70 directing pipeline companies to protect reliable and adequate natural gas
2 service, the Commission noted that

3 . . . the curtailment programs if approved by the Commission, would
4 control in all respects notwithstanding inconsistent provisions in sales
5 contracts, both jurisdictional and non-jurisdictional, entered into prior to the
6 date of approval of the tariff.

7
8 Related to the question posed above is the question of whether the
9 interference with existing contracts by Public Service Commission regulation is a
10 taking which requires compensation to the parties affected. Such regulation, unless
11 exercised under the right of eminent domain, would not normally require
12 compensation of the affected parties.

13 For example, the regulation of natural gas use has been found not to
14 constitute a "taking" for which compensation could be claimed against the state or
15 anyone else. The regulation of natural gas use to prohibit waste is an exercise of
16 police power that does not require compensation any more than a 55 MPH limit
17 requires a compensation for taking of citizens' automobiles or any more than an
18 electrical code requires compensation for taking of homes.

19 In *Townsend v. State*, 147 Ind. 624, 47 N.E. 19 (1897), the Indiana Court
20 was asked to consider a statute which provided:

21 The use of natural gas for illuminating purposes in what are known as
22 flambeau lights, is a wasteful and extravagant use thereof, and is dangerous
23 to the public good, and it shall therefore be unlawful for any company,
24 corporation or person, for hire, pay, or otherwise to use natural gas for
25 illumination purposes in what are known as flambeau lights....

26

1 The plaintiff attacked the statute on the grounds that it violated the provision
2 of the Fourteenth Amendment of the Federal Constitution that no state shall
3 "deprive any citizen of life, liberty or property without due process of law." After
4 admitting that the natural gas was private property, the Court stated at 21:

5 The Act in no way deprives the owner of the full and free use of his
6 property. It restrains him from wasting gas to the injury of others or to the
7 injury of the public.

8
9 In *F.C. Henderson, Inc. v. Railroad Commission*, 56 F.2d 218 (W.D. Tex.
10 1932), the plaintiff alleged deprivation of property without due process of law
11 because of a law dealing with protection of natural gas from waste, The Court
12 rejected the plaintiff's argument. The statute involved provided at 221:

13 Neither natural gas nor crude petroleum shall be produced,
14 transported, stored, or used in such a manner or under such conditions as to
15 constitute waste....

16
17 The plaintiff who was bound by an "out-put" type contract with well-owners
18 (i.e., plaintiff had right to take all the production) alleged that enforcement of the
19 statute would violate his contracts, would be a taking of property without due
20 process, and would destroy plaintiff's business. There was no dispute that there was
21 no other market for the natural gas. The Court held, at 221:

22 We are not in doubt that ... upon consideration of conserving the
23 natural resources of the State, ample power exists in the legislature to
24 prevent the wasteful utilization of oil and gas, and to regulate and control
25 their production and use in such reasonable way as to bring about their
26 conservation, and to prevent their dissipation by waste. We therefore reject
27 all of the plaintiff's contentions against the statutes founded upon legislative
28 wont of power. . . ."

1
2 Since NorthWestern denies that it “may not avoid reasonable regulation by
3 contract,” (meaning that it asserts it may avoid reasonable regulation by contract),
4 its coming brief must detail any authority it can cite for allowing NorthWestern to
5 avoid reasonable regulation by contracting with Montana cities for street lighting?

6 **3g. Pursuant to what authority can the Commission consider**
7 **and decide on the constitutionality of a statute?**

8
9 **PETITIONERS’ RESPONSE:** Complainants ask the Commission:

10
11 **For an order declaring MCA § 69-3-321 unconstitutional and in**
12 **violation of the equal protection and due process clauses of the US and**
13 **Montana Constitutions because there is no compelling state interest or**
14 **rational basis for the invidiously discriminatory distinction affording**
15 **“any mercantile, agricultural, or manufacturing society or club; by any**
16 **body politic or municipal organization or association” standing to bring**
17 **a matter before the Commission if they are “interested” while requiring**
18 **any other “person, firm, or corporation” must be “directly affected” by**
19 **various events enumerated in subparagraphs “a” through “c.”**

20
21 Perhaps the reason the Commission asked for a brief on this issue is because
22 of the holding in *Brisendine v. State, Dept. of Commerce* (1992), 253 Mont. 361,
23 366, 833 P.2d 1019, 1021-22 which explained:

24 Generally, we have held that before a party can seek declaratory relief, he
25 must exhaust all administrative remedies. *Mitchell v. Town of West*
26 *Yellowstone* (1988), 235 Mont. 104, 108, 765 P.2d 745, 747-48. However,
27 the exhaustive doctrine does not apply when constitutional issues are raised.
28 *Mitchell*, 765 P.2d at 748. Thus, when a party raises a bona fide
29 constitutional claim, he has a right to resort to declaratory judgment, rather
30 than submitting himself to an ordinance or rule he deems unconstitutional.
31 *Mitchell*, 765 P.2d at 748. Our reasoning is based upon the lack of authority
32 in administrative agencies to determine constitutional issues. *Mitchell*, 765

1 P.2d at 748. Such decisions rest within the exclusive jurisdiction of the
2 courts. Mitchell, 765 P.2d at 748.

3
4 However, that explanation is confusing because the result in *Brisendine* was
5 that Brisendine was told he had not properly framed a constitutional challenge by
6 seeking a declaratory judgment in Court prior to exhausting administrative
7 remedies. The Court then opined:

8 Appellant overlooks the fact that he has another administrative remedy
9 available. He could ask the Board for a declaratory judgment pursuant to
10 Sec. 2-4-501, MCA. If the decision is adverse, he could then appeal it to the
11 District Court pursuant to Sec. 2-4-506(4), MCA.

12
13 MCA § 2-4-501 of the Administrative Procedures Act provides:

14
15 **2-4-501. Declaratory rulings by agencies.** Each agency shall provide by
16 rule for the filing and prompt disposition of petitions for declaratory rulings
17 as to the applicability of any statutory provision or of any rule or order of the
18 agency. A copy of a declaratory ruling must be filed with the secretary of
19 state for publication in the register. A declaratory ruling or the refusal to
20 issue such a ruling shall be subject to judicial review in the same manner as
21 decisions or orders in contested cases. [Emphasis added]

22
23 Thus, while the challenge to the basic statute may not require exhaustion of
24 administrative remedies, if there is a controversy over the constitutionality of the
25 statute **as applied**, our Court seems reluctant to permit premature review as was
26 the case in *Brisendine*. For that reason and for the reasons expressed in the
27 discussion of issue 3b briefed above, about how MCA § 69-3-321 is being applied,
28 complainant has started at the administrative agency level by seeking a declaratory
29 judgment “**declaring MCA § 69-3-321 unconstitutional and in violation of the**
30 **equal protection and due process clauses of the US and Montana**

1 **Constitutions" because it applies unequal criteria for when the fundamental**
2 **right to petition for a redress as is now being applied by the Commission after**
3 **the *Williamson* ruling.**

4 Respectfully submitted,

5 
6 _____

May 29, 2013

7 Russell L. Doty, Attorney at Law
8 Montana State Bar # 2472
9 4957 W 6th St.
10 Greeley, CO 80634-1256
11 Phone: 406-696-2842
12 Email: rwiln4u1@earthlink.net

13

CERTIFICATE OF SERVICE

I certify that pursuant to ARM 38.2.313 on May 29, 2013, an accurate copy of the foregoing **COMPLAINANTS' BRIEF OF ISSUES REQUESTED BY COMMISSION** in **Docket No. D2010.2.14** was served upon the parties listed below in the manner provided:

<input type="checkbox"/> US Mail Original <input checked="" type="checkbox"/> XX Hand-deliver Original+10 copies <input type="checkbox"/> Via Fax: <input 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 type="checkbox"/> US Mail <input checked="" type="checkbox"/> XX Hand-delivery <input type="checkbox"/> Via Fax: <input type="checkbox"/> E-mail:	Brenda Elias, Montana Public Service Commission 1701 Prospect Av PO Box 202601 Helena, MT 59620-2601 Email: belias@mt.gov
<input type="checkbox"/> XX US Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-delivery <input type="checkbox"/> E-mail:	Robert A. Nelson, Montana Consumer Counsel 111 North Last Chance Gulch Suite 1B Box 201703 Helena MT 59620-1703 Email: robnelson@mt.gov
<input checked="" type="checkbox"/> XX US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> E-mail:	Sarah Norcott, Esq., Attorney for NorthWestern Energy 208 N Montana Ave., Suite 205 Helena, MT, 59601 Email: sarah.norcott@northwestern.com
<input checked="" type="checkbox"/> XX US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> E-mail:	Leo & Jeanne Barsanti 3316 Pipestone Dr. Billings, MT 59102 Email: leoj47@msn.com
<input checked="" type="checkbox"/> XX US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> E-mail:	James T. & Elizabeth A. Gruba 2527 Wyoming Ave. Billings, MT 59102 Email: jtgruba@hotmail.com
<input checked="" type="checkbox"/> XX US Mail <input type="checkbox"/> Hand-delivery <input type="checkbox"/> E-mail:	Michael W. & Frances E. Paterson 3906 Heritage Billings, MT 59102 Email: montanalman2003@yahoo.com
<input checked="" type="checkbox"/> XX US Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-delivery <input type="checkbox"/> E-mail:	Nedra Chase NorthWestern Energy 40 E. Broadway Butte, MT 59701-9394 Email: Nedra.Chase@northwestern.com

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