

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

IN THE MATTER OF THE PETITION OF
JAMES T. AND ELIZABETH A. GRUBA;
LEO G. AND JEANNE R. BARSANTI; &
MICHAEL W. AND FRANCES E.
PATERSON, ON BEHALF OF THEMSELVES
& OTHERS SIMILARLY SITUATED,
Complainants.
VS.
NORTHWESTERN ENERGY,
Defendant.
REGULATORY DIVISION
DOCKET NO. D2010.2.14

COMPLAINANTS'REPLY BRIEF TO NORTHWESTERN'S RESPONSE
BRIEF ADDRESSING QUESTIONS RAISED BY COMMISSION

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

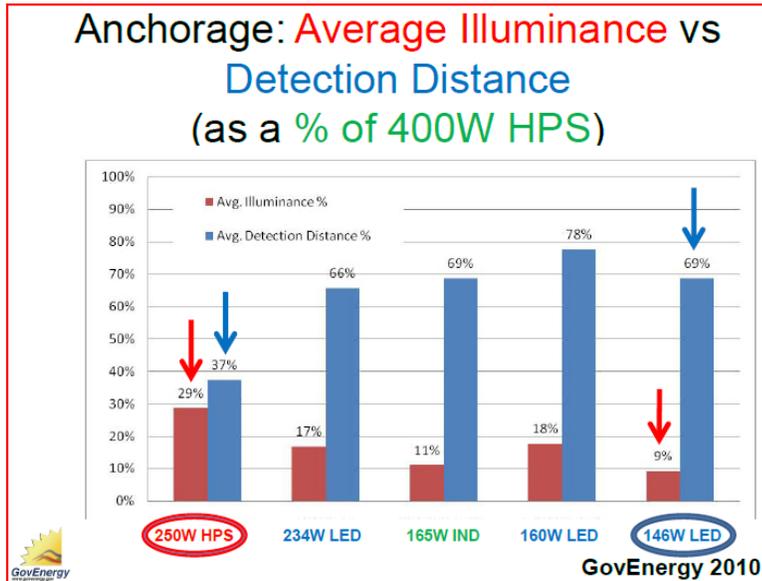
REPLY TO NWE'S RESONSE BRIEF: True, Complainants pled that

Patersons were not in a street lighting district, and therefore acknowledged that
under the Commission's current interpretation of MCA § 69-3-321 as sustained by
the Court in Williamson v. Montana Public Service Commission, 272 P.3d 71, 364
Mont. 128; 2012 MT 32 (Mont. 2012), Patersons are not "directly affected" by
rates which afford standing to petition the Commission under MCA § 69-3-321(1).

1 Nevertheless, Complainants’ initial brief explained that the Commission
2 might wish to change the interpretation of MCA § 69-3-321(1)(c) given by its
3 predecessor. Why? Because the *Williamson* analysis upholding the determination
4 on adequacy of service at ¶ 39 did not contain material from any brief filed in
5 *Williamson*. Thus, Complainants seek to respond to the reasoning first expressed in
6 that ¶ 39. Specifically, Complainants suggest the current Commission could rule
7 that Patersons and others, who regularly drive in Billings at night, are directly
8 affected by the poorer quality of light emitting from high pressure sodium
9 luminaires (HPS).

10 LED luminaires emit more light in the scotopic and mesopic light spectrums
11 than emitted by HPS luminaires. The additional light emitted by LEDs makes it
12 easier for everyone to see at night under LED light.

13 If Complainants had been allowed to introduce facts at a hearing on the
14 service issue, they would have (and will) produce the Anchorage, Alaska tests
15 which showed that drivers could distinguish objects more than twice as far away
16 on roads lit by 165-watt LEDs than on roads lit with traditional 250-watt HPS
17 fixtures. Thus, we all are directly affected by the failure to install LEDs on our
18 roads.



From Nancy Clanton PPT at
<http://www.govenergy.com/2010/Files/Presentations/Technology/Technology%20S4%20Clanton.pdf>

16

1

2

The Court should have taken Complainants' allegations as true for purposes

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of determining the motion to dismiss on the inadequate service allegation. Instead

4

it claimed that even if it were true that service was inadequate, the legislature

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would not intend a broad grant of standing to anyone driving through a Montana

6

town to make such a claim. No record about legislative intent supports that ruling

7

and we were not seeking standing for anyone driving through a Montana town.

8

If a person who drives on our streets can show that LEDs will make our

9

roads safer, why would the legislature not want that person to have standing to

10

prove that claim before the PSC?

11

Further, contrary to Justice Nelson's ¶ 39 assertion, the statute does not

12

require that persons be directly affected by the rates mentioned in MCA § 69-3-

1 321(1)(a) prior to a determination that they are directly affected by “service” as
2 provided in MCA § 69-3-321(1)(c). The word “or” at the end of subparagraph
3 MCA § 69-3-321(1)(b) indicates the legislature intended that the requirement in
4 subparagraph (a) does not have to be met before a finding that a person directly
5 affected by service has standing to bring a complaint under subparagraph (c).

6 NWE cites *Olson v Department of Revenue* (1986), 223 Mont. 464, 469; 726
7 P.2d 1162, 1166 (quoting *Baker v Carr*, 369 U.S. 186, 204; 82 S.Ct. 691, 703
8 (1962) in its standing discussion. Those cases were rejected as being incorrectly
9 applied by Justice Nelson’s opinion in *Williamson*. He ruled at ¶ 30:

10 “...administrative adjudications are not considered Article III proceedings to which
11 case-or-controversy or prudential standing requirements apply.” [Citations
12 omitted]

13 **3b. Commission staff has concluded that a complaint may be filed pursuant to**
14 **Mont. Code Ann. § 69-3-321 but that Mont. Code Ann. §§ 69-3-301 and -304**
15 **and ARM 38.5.8218 do not serve as a basis on which a complaint may be**
16 **based. If you disagree with staff’s conclusion, briefly explain how Mont. Code**
17 **Ann § 69-3-301 and -304 and ARM 38.5.8218 can serve as a basis for**
18 **Complainants’ claims in the Second Amended Complaint?**

19
20 **REPLY TO NWE'S RESPONSE BRIEF:** Footnote 2 of *Williamson*

21 summarizes the comprehensive regulatory scheme where complainants:

22 ... may complain of anything done or omitted to be done by the
23 commission or any person over whom the commission has jurisdiction in
24 violation of any law, rule, regulation or order administered or promulgated

1 by the commission, pertaining to matters over which the commission has
2 jurisdiction. Admin. R.M. 38.2.2101(1). [Emphasis added]¹

3
4 Thus, “All of the Commission’s regulatory statutes must be considered as
5 part of a comprehensive regulatory scheme.”² This approach was noted in *Petition*
6 *of Montana Power Co. for Increased Rates and Charges in Gas and Elec. Services*,
7 590 P.2d 1140, 1149; 180 Mont. 385, 399-400 (Mont. 1979) where Justice Daly
8 wrote:

9 The power of the Commission under section ... 69-3-109 MCA, to
10 "investigate and ascertain" the value of utility property has been discussed
11 above. The means and authority by which the Commission is to conduct its
12 investigation is indicated in several statutes. [Listing of statutes omitted]

13
14 **MCA § 69-3-304.** NWE asserts “no language within this specific statute
15 [MCA § 69-3-304 allowing for temporary rates] provides a third party the right to
16 file a complaint against the utility.”³ [Clarification added] No language in § 69-3-
17 304 provides a utility (like NWE) the right to file for a temporary rate increase
18 either, but it is regularly done.

19 If, under the interpretation NWE's unwittingly proposes here, Complainants
20 may not use § 69-3-304 as a basis to seek a rate reduction when complaining about
21 unreasonable and unjustly discriminatory rates while filing pursuant to § 69-3-

¹ Also see ARM § 38.2.601(i) for similar wording.

² Complainants’ Initial Brief, p. 7.

³ Response Brief, p. 8.

1 321(a), then NWE may not use § 69-3-304 as a basis for seeking temporary rate
2 increases when filing rate cases pursuant to MCA § 69-3-323.

3 Rather, the words used in § 69-3-304 indicate the legislature intended the
4 Commission to have power to approve temporary increases or decreases in rates
5 regardless of the source of the request; either on its own motion (pursuant to MCA
6 § 69-3-324) or when properly petitioned by a utility (pursuant to § 69-3-323) or by
7 a third party (pursuant to § 69-3-304).

8 NWE also misstates the procedure governing application for a rate reduction
9 by contending Complainants should apply to the Court for relief prior to PSC
10 ruling on a rate reduction request.⁴ Interlocutory appeal by either NWE or
11 complainants does not occur until after the Commission rules on a temporary rate
12 decrease request.

13 The First Amendment right to petition for a full redress of grievances
14 includes the right to obtain a temporary rate reduction. Therefore, to mitigate
15 NWE's attempt to claim the PSC cannot reduce rates retroactively, Complainants
16 renew the request for a temporary rate reduction that they have made since
17 February 2010, and again respectfully ask for an immediate hearing on that
18 motion.

⁴ Response Brief, p. 8, line 22 – p. 9, line 3.

1 **MCA § 69-3-301.** NWE contends “No language within § 69-3-301, MCA
2 provides a party the right to file a complaint against a public utility for failure to
3 comply with the statute.” And, “When construing a statute, one cannot ‘insert what
4 has been omitted’” § 1-2-101, MCA. NWE's analysis is misleading.
5 Complainants right to complain about failure to comply with statutes and rules is
6 found in ARM §§ 38.2.60(i) and 38.2.2101 as recognized by footnote 2 of the
7 *Williamson* case.

8 NWE's Response Brief failed to clarify the methodology used to apply its
9 street lighting tariff. Rather than eliminate the confusion created by its continued
10 obfuscation surrounding application of its rates, NorthWestern avers that
11 “Complainants fail to provide ... examples where ‘previous Commissioners and
12 their staffs’ have had trouble understanding the tariff.” Not true. Proof
13 understanding was lacking lies in the fact that no Commissioner or staffer caught
14 the overcharge violation brought about by assessment of the ownership charge to
15 collect revenues in excess of the original cost of street lighting infrastructure.

16 NWE contends no language in MCA § 69-3-301 requires rate “schedules be
17 understandable,” beyond the words requiring printing in plain type. MCA § 69-3-
18 301 contains no language permitting filed tariffs to be unfathomable either. And
19 ARM § 38.5.1501, promulgated pursuant to authority implied by § 69-3-301,
20 requires rate schedules to be “clear and concise.” The explanations Complainants

1 seek will help prevent future abuse of NWE's ownership charge because they will
2 reveal when the ownership charge is being applied to collect revenues in excess of
3 original cost.

4 **ARM 38.5.8218** requires utilities to “optimize the acquisition of demand-
5 side resources” by implementing energy conservation. Petitioners base their
6 complaint on this rule by contending NorthWestern has failed to optimize the
7 acquisition of demand-side resources by not implementing more LED street
8 lighting within its service area. And NorthWestern has not done what ARM
9 38.5.8218(7) requires, namely: “A utility's development of demand-side resources
10 should include an examination of innovative methods.”

11 Complainants’ initial brief illustrated how far NWE is behind in acquiring
12 demand-side street lighting resources by referencing progress made in Los
13 Angeles. Since that brief, LA has completed its transition to LED street lighting by
14 retrofitting all 141,089 street lights with LED bulbs. The new lights now reduce
15 energy use by 63.1% (20,240 kW) in areas where replacements have been made,
16 and reduce carbon emissions by 48,873 metric tons a year. This reduces the energy
17 needed each year by 82.57 GWh and is saving Los Angeles \$7,352,263 a year in
18 energy costs. Savings will rise to \$10 million a year as installation costs are
19 amortized.⁵ LA is also expecting a substantial reduction in maintenance costs.

⁵ http://bsl.lacity.org/downloads/led/LED_Energy_Savings_061913.pdf

1 Rather than defend its gross failure to comply with ARM § 38.5.8218,
2 compliance with which is a proper basis for illustrating the lack of adequate service
3 as pled in the complaint in this proceeding, NWE’s response brief suggests concern
4 about failure to maximize demand side LED street lighting resources be expressed
5 by Complainants’ intervention in the annual Electricity Supply Tracker filing.
6 Intervention in that proceeding is not required by MCA § 69-3-321(1)(c), the
7 portion of the statute under which the inadequate service alleged in this complaint
8 is proceeding.

9 Proof that NWE is not complying with the on point Administrative
10 Regulation dealing with procurement of infrastructure that will save NWE
11 customers energy and money is proof that service is inadequate. Therefore,
12 examination of the requirements of ARM § 38.5.8218 is one proper basis for
13 determining the inadequacy of the street lighting service complained of.

14 ARM § 38.5.2006 also requires: “(1) Utilities should optimize demand- and
15 supply-side resources ...”

16 ARM § 38.5.2007 requires:

- 17 (1) Plans which are consistent with the overall goal and definition of
18 integrated least cost resource planning and acquisition will not concentrate
19 solely on minimizing dollar costs, but will also consider the impacts on
20 society and the environment over the long-term. Least cost resource plans
21 should seek to provide the best balance of the following non-all-inclusive list
22 of objectives:
23 (a) minimize the societal cost of producing energy services,
24 ...

1 (c) minimize the environmental and other external costs not incorporated
2 into the formal cost analysis....

3
4 And ARM 38.5.2003(1) explains the requirements for addressing external
5 environmental costs in utility resource portfolios, resource planning, and
6 acquisitions as follows:

7 (a) A range of environmental impact mitigation and control costs should be
8 quantified... using the best available methods for assessing environmental costs.
9 External environmental costs which are nonquantifiable should not be ignored;
10 they should be incorporated using documented judgment in the multiple attribute
11 evaluation;

12 ...

13 (d) Existing and potential resources should be weighed and ranked, in part, on
14 the basis of their environmental impacts ... by drawing on the best available
15 scientific and engineering methods...;

16 ...

17 (h) Sensitivity analyses should be conducted to determine if more
18 environmentally benign resource alternatives exist which can provide equivalent
19 benefits at lower societal cost.

20 ...

21 **3c. Based on what authority can the Commission order a refund of previously**
22 **collected “ownership charges” that were collected pursuant to PSC-approved**
23 **electric lighting tariff? (See paragraph J on page 4 of the Second Amended**
24 **Complaint.)**

25
26 **REPLY TO NWE'S RESPONSE BRIEF: While NWE’s ELDS-1 rate is**
27 **prima facie lawful, that does not mean the statutory prima facie**
28 **acknowledgement cannot be challenged and rebutted. “An opposing party may**
29 **defeat the prima facie case by adducing contrary or impeaching evidence....”**

30 *Professional Mobile Home Transport v. Railroad Com'n of Texas*, 733 S.W.2d 892
31 (Tex.App. —Austin 1987). See also *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct.

1 2658, 174 L.Ed.2d 490, 77 USLW 4639 (2009) recognizing that “Once a plaintiff
2 has established a prima facie case of disparate impact, the employer may
3 defend....”

4 **Complainants have rebutted the statute’s prima facie acknowledgment**
5 **of ELDS-1 rate validity.** While a Commission may not order a refund of rates
6 collected under a lawfully approved tariff correctly implemented (as argued by
7 NWE), it may do so if the tariff is vague and has been incorrectly applied. Thus,
8 while NWE's tariff in its various iterations may be valid when correctly applied,
9 Complainants’ pleadings demonstrate (and irrefutable mathematical evidence has
10 shown and will show) that NorthWestern’s application of the tariff’s ownership
11 charge in many SILMDs has returned revenues exceeding the original cost of older
12 street lights by approximately \$2.1 million a year.

13 NWE cites no authority granting the PSC, either in a legislative or quasi-
14 judicial capacity, power to make “prima facie lawful” the assessment of tariff rates
15 beyond the time when the original cost of utility property has been completely
16 recovered. The lack of such power makes the PSC’s approval void as was
17 determined in *Dallas Power & Light Co. v. Carrington*, 245 S.W. 1046
18 (Tex.Civ.App. 1922) because:

19 ... whether or not the city of Dallas attempted to legislate or contract
20 for ... rates to be charged ... for light, it could not lawfully do so, and such
21 attempt was *ultra vires*, beyond its charter powers, of no effect, and void.
22

1 Under Montana law, approval of NWE's "creative" application of ELDS-1
2 would be an ultra vires act, done without authority. It would violate § 69-3-109,
3 and MCA § 69-3-201 as an unlawful unjust and unreasonable charge, and deprive
4 customers of due process by requiring payment of an illegal charge that the
5 Commission had no authority to tacitly or intentionally approve.

6 **Revenues that have been collected without proper authority are illegal**
7 **from the beginning. The doctrine preventing retroactive ratemaking does not**
8 **apply to the recoupment of revenues illegally collected in the first place.** The
9 retroactive ratemaking cases cited by NWE do not cover recoupment of rates that
10 were void from the beginning. In such a situation, the observation in *Helvering v.*
11 *National Grocery Co.*, 304 U.S. 282, 58 S.Ct. 932, 82 L.Ed. 1346 (1938) applies.
12 There the Court opined: "Clearly, retroactive assessment is no more objectionable
13 here than in the case of penalties for fraud or negligence."

14 Also please consider *Washington Gas Light Co. v. Public Service Com'n of*
15 *District of Columbia*, 450 A.2d 1187, 1218-1219 (D.C. 1982) where in 1982 the
16 court found "the Commission's amortization of all gains realized since 1955 did
17 not constitute illegal retroactive ratemaking." Even the Commission's prior
18 acquiesce "in the Company's use of a method of accounting that did not reflect the
19 actualities or the equities of debt financing..." did not afford the utility's

1 stockholders “an immediate ‘vested’ interest in all gains realized prior to the 1977
2 test year.”

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

6
7 **REPLY TO NWE'S RESPONSE: Complainants and NWE both cite
8 MCA § 69-3-102 investing the Commission “with full power of supervision,
9 regulation, and control of such public utilities.”⁶**

10 Part of that supervisory scheme is:

11 **69-3-108. Standards for and examinations of products and
12 services.** (1) The commission shall ascertain and prescribe ... suitable and
13 convenient commercial units of product

14 (2) The commission shall ascertain and fix adequate and serviceable
15 standards ..., or other conditions pertaining to the supply of the product

16
17 NWE cites *Petition of Montana Power Co. for Increased Rates and Charges*

18 *in Gas and Elec. Services, supra.* at 180 Mont. 399-400 for the proposition that the
19 Commission had exceeded its authority in ordering Montana Power to hire an
20 independent consultant (for \$300,000) to discover the original cost of the dams
21 before the heads of Montana Power and the Great Northern Railroad sold them
22 back and forth to inflate their value prior to that number being used to pump up
23 Montana Power’s so-called “fair value” rate base.

⁶ Reply Brief, p. 9, fn. 7; Complainant’s Initial Brief, pp. 7, 27 & 29.

1 However, that order also noted the Commission could require the utility to
2 supply the information based on consultants the utility chose to hire and “weigh ...
3 information ... presented by ... its own staff.” In this case, Complainants are not
4 asking that a certain, Commission-approved, “consultant” (i.e., manufacturer of
5 LEDs) be used. Complainants reference many acceptable manufacturers on a list
6 from Pacific Gas & Electric and indicate NWE could benefit from the experience
7 of others if it joined (for free) the Municipal Solid State Lighting Consortium. It is
8 reasonable for the Commission to exercise its supervisory authority by asking
9 NorthWestern, at no cost, to benefit from the experience of others.

10 The case NWE cited did not prevent the Commission from ordering an
11 accounting, it just thwarted prior approval of the accountant. Likewise, here the
12 Commission can order use of energy efficient lighting (because outmoded HPS
13 fixtures are no longer useful) while allowing NWE to choose the LEDs used
14 subject to a showing that brands chosen are reasonable, i.e., that they use much less
15 energy than HPS luminaires, provide good light, and have longevity, etc.

16 NWE contends that MCA § 69-3-1202 does not apply to it because its
17 “planning process has been governed by § 69-8-419” since the 1997 deregulation.
18 That argument is undercut by the fact that section 69-8-419 did not become law
19 until 2003—six years after deregulation. It provides in part:

20 **69-8-419. ...**

1 (2) The public utility shall pursue the following objectives in fulfilling its
2 duties pursuant to subsection (1):

3 ... (b) conduct an efficient electricity supply resource planning and
4 procurement process that evaluates the full range of cost-effective electricity
5 supply **and demand-side management options**; [Emphasis added]

6 ...

7 One rule promulgated pursuant to § 69-8-419 is ARM 38.5.8201. It does not
8 supersede ARM § 38.5.8218, the Demand-Side Resources Rule.⁷ So, the utility
9 planning and demand side management processes are governed by both statutes
10 and rules. Under either statute NWE cannot avoid its responsibility “to acquire
11 resources in a manner that will help ensure a clean, healthful, safe, and
12 economically productive environment,” as required by § 69-3-1202 and Mont.
13 Const. Art. II, § 3 & Art. IX, § 1.

14 Since LED street lights will help ensure a clean, healthful, safe, and
15 economically productive environment, as provided for in MCA § 69-3-1202, the
16 Commission may order use of LED technology.⁸

17 Further, the Commission needs a compelling state interest to circumvent its
18 responsibility to help ensure a clean, healthful, safe, and economically productive
19 environment. NWE does not contradict the case requiring that (*MEIC v. DEQ*,
20 1999 MT 248, 296 Mont. 207, 988 P.2d 1236).

⁷ ARM § 38.5.8201(5) provides: (5) These guidelines supersede the commission's electric least cost planning rules (ARM [38.5.2001](#) through [38.5.2012](#)) solely with respect to electricity supply resource planning and procurement functions. That does not include ARM § 38.5.8218.

⁸ Complainant's Initial Brief, pp. 21 & 22.

1 Likewise, NWE does not distinguish the valid exercise of the police power
2 upheld in *Miller v. Schone*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) from
3 the Commission’s valid exercise of police power to require LED street lighting.
4 The public interest in conserving energy via LED deployment clearly is preferred
5 “over the interest of the individual” (i.e., over NWE's interest in saddling
6 customers with technology that sucks more energy than needed).

7 NWE’s Response Brief also ignores the fact that “... in 1982, the PSC had
8 authority [at Montana Power’s request] to order use of a specific type of equipment
9 (HPS lights that were more efficient than those previously used)....” [Clarification
10 added] The PSC still has that authority to order technology-specific LED
11 implementation.

12 Another example of the Commission’s ordering use of a specific technology
13 lies in ARM § 38.5.1002, requiring Undergrounding of Electric Distribution Lines
14 (rather than overhead poles).

15 NWE contends “no current Montana law allows the Commission to order
16 NorthWestern to use a certain type of technology.” That ignores the
17 acknowledgment in *Williamson* at ¶ 7 where, in refusing to issue a rule requiring
18 LED street lighting, the 2009 PSC noted NorthWestern and Montana-Dakota are
19 both:

20 ...’obligated to acquire cost-effective energy efficiency and conservation in
21 their resource planning processes.’ Accordingly, the PSC stated that it

1 expected the utilities to ‘continue to monitor the technical and economic
2 aspects of LED technology’ and to ‘include consideration of LED lighting
3 technology along with other energy efficiency alternatives when the utilities
4 develop and submit their resource planning filings.’

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

8
9 **REPLY TO NWE'S RESPONSE: NWE may not freeze out the most**
10 **energy efficient street lighting technology (so it can sell more energy) merely**
11 **by refusing to apply or adopt a fair, unmetered rate for LEDs when such a**
12 **rate exists for HPS street lights, or by refusing to adopt a fair rate for use of**
13 **its poles to house customer-owned LEDs.** Pursuant to MCA § 69-3-102 and
14 MCA § 69-3-302 cited by Complainants and NWE, the Commission has power to
15 order development or application of a tariff to facilitate the use of demand side
16 resources that will enable energy conservation. Indeed the Commission has done
17 that in promulgating ARM 38.5.2008 which provides in part:

18 (1) Rate design is a key element in the integrated least cost planning
19 process. A long-term resource planning process that is consistent with the
20 guidelines will:

21 (a) explicitly recognize and utilize the ability of rate design to yield
22 demand-side resources....

23 (b) ... the influence of externalities should be incorporated into prices
24 proposed in rate case proceedings. Total marginal cost of service derived in
25 rate case proceedings should reflect total societal cost as described in these
26 guidelines. [Emphasis added]

27 ...
28

1 NWE concedes that the PSC is “permitted to allow NorthWestern to develop
2 a tariff for a specific rate,” and “may approve a technology-specific charge in a
3 tariff after a thorough examination and determination that the rate is just and
4 reasonable.” However, the Commission also has power to do more than gennulect
5 to rates proposed by NorthWestern. The cited law affords the Commission power
6 to order tariffs where none have existed previously or to order changes in tariffs
7 needed to protect Montana cities and their taxpayers from wasteful practices
8 foisted upon them by inefficient street lights provided by NorthWestern.

9 NWE contends:

10 The issue with this request is that it needs to be shown, through
11 evidence, that the current tariff is not effective in implementing the current
12 street lighting rates or, to put it differently, that the current tariff schedule
13 contains unjust and unreasonable rates.⁹
14

15 Aside from the unjust levying of the ownership charge beyond the time
16 when luminaires supplied by NWE are fully paid for, let’s evaluate whether the
17 existing tariff is unjust. NWE did not deny the assertion in Complainants’ Initial
18 Brief that NWE currently has an unmetered tariff for HPS street lights. NWE did
19 not deny that its “technology-specific” HPS charge is now being levied on the
20 great majority of unmetered street lights that are either owned by NorthWestern or
21 by a municipality buying street lighting power from NorthWestern. NWE did not

⁹ Response Brief, p. 16.

1 deny that LED street lights use less energy than the conventional (yellow light)
2 high pressure sodium (HPS) fixtures now in use.¹⁰

3 NWE did not rebut the description of how easy it is to measure wattage of an
4 LED luminaire so that the unmetered cost of energy it requires can be billed just
5 like the cost of energy used by HPS luminaires is recovered.¹¹ Complainants’
6 Initial Brief sets forth examples of unmetered tariffs and illustrates how easy it is
7 to develop them for LEDs and other technologies.¹² NWE has not enlightened us
8 by citing situations where an unmetered charge is being applied to LED street
9 lights in Billings or elsewhere.

10 NWE did not rebut Complainant’s Initial Brief assertion that “[t]he street
11 lighting tariff ought to include a charge for ... owner-owned luminaires on utility-
12 owned poles or cite any law opposing Complainants’ citation of MCA § 69-5-107
13 or the *Ottertail Power Company v. US*, 35 L.Ed.2d 359, 93 S.Ct. 1022, 410 U.S.
14 366 (1973) case requiring Northwestern to allow use of its poles to house
15 customer-owned LEDs.¹³

16 **3f. Pursuant to what authority can the Commission order NorthWestern**
17 **Energy to amend contracts referred to in paragraph G on page 4 of the**
18 **Second Amended Complaint?**

19

¹⁰ Complainants’ Initial Brief, p. 24.

¹¹ Complainants’ Initial Brief, p. 25.

¹² Complainants’ Initial Brief, pp. 24 & 25.

¹³ Complainants’ Initial Brief, pp. 26 & 27.

1 exhausted his administrative remedies by seeking a declaratory ruling from the
2 administrative agency.

3 NWE and Complainants both note that in *Brisendine*, at 1021-22, a
4 constitutional issue was not properly raised at the administrative level. Such issues
5 may be resolved in court without administrative remedies having first been
6 exhausted. Or, as Complainants note, *Brisendine* also could seek a declaratory
7 ruling pursuant to MCA § 2-4-501, the Administrative Procedure Act.

8 While in some instances administrative agencies do not have authority to
9 rule on constitutional questions, there is a broad exception to that rule. It is
10 permissible for an administrative agency to apply its administrative expertise to a
11 determination involving constitutionality, subject to later review by the Court. That
12 procedure was followed in *Great Falls Tribune v. Montana Public Service Com'n*,
13 82 P.3d 876, ¶¶ 42-44, 319 Mont. 38, ¶¶ 42-44 (Mont. 2003) where the Court
14 remanded to the PSC after opining:

15 ¶ 42 In denying the MPC's and PSC's motions to dismiss, the District
16 Court concluded that since the central issues raised by the media in the
17 district court action involved constitutional challenges to relevant
18 administrative regulations, statutes, and Montana case law, the PSC lacked
19 jurisdiction to determine the issues raised before the District Court. The
20 District Court proceeded to make factual and legal determinations ...
21 without the benefit of the administrative agency developing a record and
22 making threshold determinations on these complex issues.

23 ¶ 43 The difficulty with this approach is that it virtually eliminates the
24 very purpose of the administrative ... agencies, such as the PSC, ... to place
25 the initial decision-making into the hands of those who are most

1 knowledgeable ... to make those decisions. The district court may then
2 review the record of the agency proceedings.... [Emphasis added]

3
4 Here the PSC has the burden of resolving the factual question of whether a
5 compelling state interest justifies the invidious discrimination allowing one class
6 from petitioning the PSC for redress of grievances while shutting out another class.
7 By seeking a declaratory ruling from the PSC, Complainants are affording the PSC
8 the opportunity to articulate any compelling state interest.

9 NWE noted that when a proper constitutional issue had been raised in an
10 administrative proceeding, the matter was remanded back to the district court
11 rather than the administrative agency in *Mitchell v. Town of West Yellowstone*
12 (1988), 235 Mont. 104, 108, 765 P.2d 745, 747-48.¹⁶ However, in the *Tribune*
13 case, the constitutional determinations were remanded to the PSC rather than the
14 district court.

15 NWE incorrectly asserts: ““The right to resort to the declaratory judgment
16 act for a determination’ means a determination from the courts, not the
17 administrative agency.”¹⁷ This assertion ignores the clear reference to
18 “administrative remedy” in *Brisendine* where, the Court opined:

19 Appellant overlooks the fact that he has another administrative remedy
20 available. He could ask the Board for a declaratory judgment pursuant to

¹⁶ Response Brief, p. 18.

¹⁷ Response Brief, p, 18.

1 Sec. 2-4-501, MCA. If the decision is adverse, he could then appeal it to the
2 District Court pursuant to Sec. 2-4-506(4), MCA. [Emphasis added] ¹⁸
3

4 In this case the constitutionality of the PSC statute as applied is being
5 properly raised at the administrative level by a request for a declaratory ruling from
6 the PSC.

7 Respectfully submitted,
8

9 _____ July 15, 2013

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¹⁸ Complainants' Initial Brief, p. 34.

CERTIFICATE OF SERVICE

I certify that pursuant to ARM 38.2.313 on July 15, 2013, an accurate copy of the foregoing **COMPLAINANTS'REPLY 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"/> <u>XX</u> Hand-deliver Original+10 copies <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> E-mail:	Kate Whitney, Montana Public Service Commission 1701 Prospect Av PO Box 202601 Helena, MT 59620-2601 Email: kwhitney@mt.gov
<input type="checkbox"/> US Mail <input checked="" type="checkbox"/> <u>XX</u> Hand-delivery <input type="checkbox"/> Via Fax: <input checked="" type="checkbox"/> E-mail:	Brenda Elias, Montana Public Service Commission 1701 Prospect Av PO Box 202601 Helena, MT 59620-2601 Email: belias@mt.gov
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