

Collateral estoppel, or issue preclusion, bars the reopening of an issue that has been litigated and determined in a prior suit. *Holtman v. 4-G's Plumbing and Heating* (1994), 264 Mont. 432, 439, 872 P.2d 318, 322. We have indicated that *res judicata* will apply once a final judgment has been entered. *Holtman*, 264 Mont. at 436, 872 P.2d at 320; *Olson v. Daughenbaugh*, 2001 MT 284, ¶ 22, 307 Mont. 371, ¶ 22, 38 P.3d 154, ¶ 22; *see also State Med. Oxygen v. American Med. Oxygen* (1992), 256 Mont. 38, 43, 844 P.2d 100, 103 (indicating that “a final judgment on the merits” is a prerequisite to application of *res judicata*); Restatement (Second) of Judgments § 13 (1982) (“[t]he rules of *res judicata* are applicable only when a final judgment is rendered” but a lesser degree of finality is needed to apply issue preclusion); 18A Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction 2d* § 4434 at 128 (2002)....” [Emphasis added]

No final judgment on the merits has been issued in Docket No. N2009.4.45. As pled in Petition ¶ IV, Petitioners asked for rehearing in that Docket. No decision was issued on that request. That averment must be taken as true for the purpose of determining the motion to dismiss.

Further, this Docket No. D2010.2.14 is a rate case. Docket No. N2009.4.45 was a rulemaking dismissed without prejudice. Normally, a rulemaking decision would not prevent a subsequent ratemaking. In addition, rulemaking and ratemaking dismissals without prejudice are not final adjudications on the merits. So, no *res judicata* effect attaches.

The US Supreme Court long ago determined that an order issued within the authority of the Federal Power Commission will not be set aside merely because the Commission has on an earlier occasion reached another result; administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances. *Re Area Rate Proceeding for Permian Basin*, 390 U.S. 747, 88 S.Ct. 1344, 20 L. Ed. 312, 75 P.U.R.3d 257 (1968). In *Permian* the FPC had undertaken an ongoing review of natural gas production and rates. So the Montana Commission is not bound by any doctrine similar to *stare decisis* or *res judicata* with respect to its own prior decisions and ongoing review of LED street lights, namely the determination in Docket No. N2009.4.45.

Other prominent cases have reached a similar conclusion. See *United States v. Rock Island Motor Transport Co.*, 340 U.S. 419 (1951). There the ICC permitted a railroad to operate a trucking service. The ICC subsequently reopened proceedings and restricted the trucking operations. See also, *American Trucking Association v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 87 S. Ct. 1608, 18 L.ed.2d 847, 69 P.U.R.3d 230 (1967)

In addition, the facts in *Baltrusch* are not on point here. *Baltrusch* was a partnership dispute between brothers, not a rulemaking or ratemaking proceeding. And interestingly enough, the case went to the district court for a third time which involved other issues not foreclosed by *res judicata* at either the district or Montana Supreme Court level. See *Baltrusch v. Baltrusch*, 2008 MT 245.

No complete litigation of issues in rulemaking docket. In ¶ 18 of *Baltrusch* the Court also addressed the requirement that the party against whom the doctrine of *res judicata* is being applied must have had a fair shot at litigating the issues being foreclosed by the prior proceeding. It said at pp. 13 & 14:

In accordance with protecting litigants' due process rights, we also consider whether the party against whom preclusion is asserted was afforded the opportunity to obtain "a full and fair adjudication [of the issue] in the initial action." *Estate of Eide v. Tabbert* (1995), 272 Mont. 180, 185, 900 P.2d 292, 296 (quoting Restatement (Second) of Judgments § 28(5)(c) (1982)); *accord State v. Perry* (1988), 232 Mont. 455, 464, 758 P.2d 268, 273, *overruled on other grounds by State v. Clark*, 2005 MT 330, ¶ 32, 330 Mont. 8, ¶ 32, ___ P.3d ___, ¶ 32 (requiring a "full opportunity to present a[n] issue for judicial decision"); *Allen*, 449 U.S. at 95, 101 S.Ct. at 415, 66 L.Ed.2d at 313 (citing *Montana v. U.S.* (1979), 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210). To obviate future confusion, henceforth, in addition to the above enumerated elements, application of collateral estoppel requires that: (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred. Other courts similarly specify, as an element of collateral estoppel, the requirement of a full and fair opportunity to present an issue. See, e.g., *Indus. Commission v. Moffat City School Dist. Re No. 1* (Colo. 1987), 732 P.2d 616, 619-20; *D'Arata v. New York Cent. Mut. Fire Ins.* (N.Y. 1990), 564 N.E.2d 634, 636; *Robi v. Five Platters, Inc.* (9th Cir. 1988), 838 F.2d 318, 322; *In re PCH Associates* (2nd Cir. 1991), 949 F.2d 585, 593. We place "[t]he burden . . . on the party attempting to defeat the application of collateral estoppel to

establish the absence of a full and fair opportunity to litigate.” *D’Arata*, 564 N.E.2d at 636.

The roundtable conducted in Docket No. N2009.4.45 did not afford the Petitioners a full and complete opportunity to litigate. Petitioner’s discovery requests in that proceeding went unaddressed by either the Commission or the utilities involved. Minimal opportunity was afforded to ask questions of attorney’s for utilities or their witnesses or the witnesses appearing by phone or public witnesses. And the opportunity to rebut those statements was severely restricted.

In addition, there is some suggestion that extra record consultation with the Montana Highway Department, that Petitioners had no opportunity to address, played a part in the Commission deliberations or decision. No opportunity for example was afforded Petitioners to seek information on the calculations of and basis for financial data presented by the utilities— data that has been now discredited in part because it did not include an analysis of the ownership overcharge. Thus, these problems can all be remedied if this proceeding is allowed to progress. Witnesses from the Highway Department and utility can come forward and be cross examined and due process afforded.

Commission free to consider new developments. In dismissing Docket No. N2009.4.45 the Commission noted “LED technology is a promising technology, but is currently at a developmental stage that does not warrant a mandatory street and outdoor lighting conversion program. The Commission therefore will not pursue an LED street and outdoor lighting rulemaking at this time.” [Emphasis added]

In an earlier paragraph, the Commission instructed:

However, the Commission expects that NWE and MDU, both of which are obligated to acquire cost-effective energy efficiency and conservation in their resource planning processes, will continue to monitor the technical and economic aspects of LED

technology and will include consideration of LED lighting technology along with other energy efficiency alternatives when the utilities develop and submit their resource planning filings.

Thus, the Commission did not foreclose itself from further consideration of outdoor lighting conversion programs in the future. In fact the Commission clearly directed NWE to monitor LED lighting technology and submit the results of that monitoring when developing its cost effective energy conservation plan.

NWE's failure to monitor. NWE's Answer to the Petition in this Docket clearly indicates that it has failed to monitor how LED street lighting has moved beyond the developmental stage. That failure violates the Order in Docket N2009.4.45. NWE's Answer denied the allegations of Petition ¶s V, 58, 59, 60, and 61, claiming it was “without knowledge or information sufficient to form a belief as to the truth of the averments” contained in those paragraphs. NWE continued that the averments in those paragraphs were “speculative and unverified by fact or law.”

If NWE were in reality on top of monitoring LED development as ordered by the Commission, NWE would know the allegation in ¶ 60 was true, namely that “Los Angeles has embarked on a program to replace 140,000 of its street lights with LEDs within 5 years.” And it would have admitted the statement in Petition Summary ¶ V that 8,000 of those lights had already been installed in Los Angeles. ¹

¹ It would not have been difficult for NWE to verify the allegations in ¶ 60 if it were truly monitoring LED street lighting progress. See <http://www.ledwaystreetlights.com/Benefits/pdf/case-study/ledway-LA-CaseStudy.pdf> where summarizing the Los Angeles street lighting replacement program, the LED vendor indicates “In 2009, the City installed 8,000 LEDway streetlights and is expected to replace a total of 30,000 streetlights each year for the next four years.” The City of Los Angeles has copious amounts of documentation on the testing of LED street lights, etc. at its web site <http://www.bsl.lacity.org/> where President Clinton is quoted in the official press release on the program saying, “I am proud that the Clinton Climate Initiative is helping the City of Los Angeles replace 140,000 streetlights with LED units” The web site also states “There will be no additional charge or fee for this conversion. The cost will be paid through the savings in energy and maintenance.”

Likewise NWE should have known and been able to admit the allegation in Petition ¶ 61 that “Anchorage, Alaska is completing replacement [of] 16,000 of its street lights with LEDs.”²

A minimal amount of checking by NWE concerning the allegations in Petition ¶ 59 would have allowed NWE to admit that “Ouray, Colorado and Greenberg, Kansas have become all-LED cities.”³

Correction of Petition pursuant to A.R.M. § 38.2.1207. Summary of Petition ¶ V pled in part, “Michigan received 269 requests from local governments that wished to use Economic Recovery Act money to replace existing street lights with energy efficient LEDs.” The number comes from a report that was confusing. Apparently the 269 number should be 85 local governments applied for stimulus money to fund indoor, outdoor, and street lighting LED projects.⁴

Petitioners inserted ¶s V, 58, 59, 60, and 61 in the Petition to indicate that after the proceeding in Docket No. N2009.4.45 new material on the issue of LED market penetration, and

² It would not have been difficult for NWE to verify the allegations in ¶ 61 if it were truly monitoring LED street lighting progress. See <http://www.muni.org/Departments/OCPD/Pages/energyefficiency.aspx> where the City of Anchorage website proclaims:

Anchorage has over 16,000 outdoor lights using 30-year-old technology. Through extensive testing, we’ve identified LED lighting as the technology of the future for outdoor lights, and we are moving ahead with a plan to make LED lights the standard for all of Anchorage’s outdoor lighting, including streets, parking lots and garages, and trails. These fixtures use half the energy of current HPS technology and last seven times as long.

Following recent Assembly approval of phase 1, roughly 4,000 LED fixtures have been installed throughout the city. At an initial investment of \$2.2 million and an annual savings of \$360,000, these fixtures will pay for themselves in less than seven years, and produce ongoing savings for the life of the fixture.

³ See <http://www.ledwaystreetlights.com/Benefits/pdf/case-study/ledway-ouray-CaseStudy.pdf> which with regard to Ouray, CO said “LEDway streetlights replaced all 400-watt mercury vapor fixtures along Main Street and 175-watt mercury vapor fixtures on all other streets.”

There are 10,500 Google “hits” on a search of “Greensburg, Kansas going green”. So it is hard to imagine how NWE personnel who are tasked with being on top of LED street lighting progress would miss that and not be able to admit the fact in its answer to the Petition. See http://www.google.com/search?q=greensburg+kansas+going+green&rls=com.microsoft:en-us:IE-SearchBox&ie=UTF-8&oe=UTF-8&sourceid=ie7&rlz=1I7TSHB_en

⁴ <http://www.themorningsun.com/articles/2009/12/20/news/srv0000007117779.txt>

acceptance beyond the developmental stage of some preliminary programs mentioned in Docket No. N2009.4.45 had occurred. The very fact that NWE indicates it is without knowledge, etc. sufficient to admit these well established ¶ 58 -61 facts is prima facia proof that those averments were not considered in Docket No. N2009.4.45 to the extent necessary for them to be easily established in the mind of respondents in that Docket.

A case decided prior to important amendments in the natural Gas Act was not controlling for the Federal Power Commission which was required to interpret facts in light of important changes occurring after the original case was decided. *Re International Paper Co.* 42 FPC 248, 80 P.U.R.3d 88, Opinion No. 563 (1969).

New developments. The Commission found in Docket No. N2009.4.45 that LED technology, while promising did not yet “warrant a mandatory street and outdoor lighting conversion program” in all cases. As pled in ¶ III, this Petition narrowly addresses the cases where a mandatory conversion is warranted based on changed circumstances and consideration of the ownership overcharge rate that was not at issue in the rulemaking docket.

Adding to the averments concerning LED progress in the Petition, additional progress will be presented during the evidentiary part of this proceeding. Petition ¶ 58 stated “Many cities are well on their way to transitioning to LED street lighting.” NWE denied it. One wouldn’t expect NWE or the Commission to have heard about Guangzhou, China’s March 16 announcement at the time NWE filed its answer to the Petition the following day. The capital of Guangdong Province, expects to have more than 50,000 LED street lights installed before the opening of the 16th Asian Games on Nov. 22, 2010. Guangzhou currently has around 8,000 LED street lights in 40 avenues and roads in four districts.⁵

⁵ <http://www.hktdc.com/info/vp/a/tech/en/1/3/1/1X06PI3F/Technology/Guangzhou-allocates-RMB-20-mln-for-LED-street-lights.htm>

However, NorthWestern personnel should have caught the June 2009 Wall Street Journal Article indicating Chinese local governments would be installing 1.4 million LED street lights in 2009.⁶

The evidence will show that Petitioners know of at least 366 local governments in 43 states and 24 countries that are in various stages of converting to LED street lighting. The number could be as high as 451 if all 85 Michigan communities applying for Recovery Act money for LED street lights receive funding. That is several hundred more municipalities than when NorthWestern was claiming in Docket No. N2009.4.45 that the LED street lighting technology was still in the developmental stage. How many cities does it take for NorthWestern to change a light bulb?

As a general rule, after passage of sufficient time to permit changes in the evidence on which a prior administrative decision was based, and absent evidence of harassment by the agency, subsequent action against the same party for recurring issues focusing on a somewhat different problem arising from same type of conduct are not ordinarily barred by either the collateral estoppel or bar and merger aspects of the *res judicata* doctrine.

Further, NWE has not correctly analyzed the cost effectiveness of LED lighting in conjunction with all of the elements in its street lighting tariff.

No identity of issues. Petitioners agree with NorthWestern that in order for *res judicata* to be applied, there must be an identity of issues or claims between the prior proceeding and this one.

The issue of whether or not NorthWestern was allowing LED street lights on its poles is one of the issues raised here that was never raised in Docket No. N2009.4.45. Other than its

⁶ My link to the June 7 or 8th, 2009 Wall Street Journal Article is broken but this event is also reported at <http://www.glgroup.com/News/LED-business-is-lucrative-even-during-economic-downturn-43384.html> . It said ”

unsupported statement, NWE has not supplied any affidavit or other proof citing to the document and page or oral presentation that the issue involving whether lights could be on NWE poles was raised or ruled on. Thus, no issue preclusion doctrine can be applied to that issue or to the several Petition ¶ A through ¶ P requests for relief surrounding the ownership overcharge and its application and the contracts NWE has with various municipalities.

Even if the ¶ A through ¶ P issues had been raised in Docket No. N2009.4.45, they were never briefed and new information is now available. For example, it was not mentioned in Docket No. N2009.4.45 that Pacific Gas & Electric has a provision in its tariff allowing local governments in its area to use its poles if the government can obtain funding to place city-owned LED street lights in service. Detroit Edison allowed Ann Arbor, Michigan, to place city-owned LEDs on Detroit Edison poles. FERC Order 888 requires that competing carriers be allowed access to a utility's transmission and distribution system as does case law that has evolved since the 1970s.

It is good public policy to curb anti-competitive practices. The PSC's ordering the allowance of access to poles that consumers have already paid for will save consumers from having to foot the bill for the utility's defense against an anti-trust lawsuit or of replacing utility owned poles with city-owned poles.

A correct statement of what Petitioners are asking is for the Commission to allow [not force] cities to install city owned LED street lights on NWE poles. NWE won't install these lights itself. So the only way cities can reduce the energy component of their nighttime lighting by 50% or more is to be able to use poles that in approximately 85% of the cases have already been paid for by members of the lighting districts. Montanans didn't get the benefit of having paid several times for our dams because Montana Power sold them out from under the customers

who paid for them. Similarly, NorthWestern Energy is refusing to allow street lighting customers to get the benefit of having paid for the poles and wires supporting street light luminaires.

No identity of parties. An additional requirement for *res judicata* is that there be an identity of parties. Such identity does not exist here. With the exception of Dr. Williamson, the Petitioners in this docket are different than the Petitioners in Docket # N2009.4.45. That is Petitioners Rev. Dr. Vern Klingman and Patricia Klingman were not Petitioners in the 2009 docket. Neither was Russell L. Doty (although he was an attorney in the earlier docket as in this docket).

STANDING

NorthWestern argues that the Petitioners lack standing to pursue the matters set forth in the Docket No. D2010.2.14 Petition. NWE's contention does not conform to the requirements of the Montana Constitution, state statutes or Commission rule.

If Montana Power, NorthWestern Energy's predecessor had standing to request the Commission to require high pressure sodium lights on utility-owned poles in Docket No. 82.8.54, then Petitioners have standing to challenge the ownership overcharge resulting from that 1982 decision and to remedy that decision by requiring lights that will be even more energy efficient than high pressure sodium to be used. As was set forth in those earlier Orders, and as is discussed below, the Commission specifically mentioned that if a more energy efficient light became available NWE could use it.

Not taxpayer litigation. This is not, as NWE contends, a suit governed by the taxpayer standing litigation surrounding constitutional challenges to the way a government is using taxes. Petitioners are ratepayers damaged individually and collectively to varying degrees by rate overcharges and by the refusal of their utility to provide their city with energy efficient lighting.

Petitioners just happen by circumstance to be required to pay the street light bill through local taxes. Petitioners are not challenging the payment of the bill by the cities. Petitioners are not challenging the city's right or a lighting district's right to spend taxes on street lighting. So this case is unlike the taxpayer cases NWE cites. Rather, as permitted by statute, Petitioners are challenging the utility's overcharge and profligate waste of energy.

Even if this were a suit governed by the taxpayer standing line of cases, Petitioners would have standing. See *White v. State*, 759 P.2d 971 (1988) (Court No. 87-557) where the plaintiffs were "residents, citizens, electors and taxpayers of Montana." They sought a ruling invalidating House Bill No. 700, which became law in 1987. While issuing a declaratory ruling voiding the law, the Court noted that the State conceded "that plaintiffs, as taxpayers, have standing under the rule articulated in [Grossman v. State \(1984\), 209 Mont. 427, 682 P.2d 1319, 41 St.Rep. 804.](#)"

The principles of standing do not prevent Petitioners from exercising the right granted by statute to challenge utility rate overcharges no matter how they are paid. And the principles of equity require that standing be acknowledged.

Utility cannot foreclose third party contract rights by contract with primary party.

In addition, a person directly affected by rates under an unconscionable contract has standing to challenge unconscionable utility contracts with their local government that purport to prevent the Petitioners from litigating grievances under those contracts as third party beneficiaries; or to challenge the anti-competitive actions of their utility that prevents them from lowering the energy component of their street lighting bills by 50% because the utility won't allow their governments to use utility-owned poles that have been completely paid for by the consumers to support energy efficient lighting.

The PSC statutes give them the right to bring these matters before the Commission that has regulatory authority over them. Indeed, bringing such matters first in District Court or before a City Council would draw loud objections from NorthWestern that the wrong forum was being asked for a remedy and that the Council had no jurisdiction over rates in the contract and the district court had no jurisdiction until administrative remedies had been exhausted.

The Montana Constitution, Article II, Sections 8 provides:

Right of participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

This section must be applied here.

In one of the cases cited by NWE, *Fleenor v Darby School Dist.*, 2006 MT 31, 331 Mont. 124, 128 P.3d 1048, the Montana Supreme Court agrees that it should liberally construe the Constitution and literally interpret “the public” and “citizen” to include anyone who has an interest in enforcing the broad policies and protections of Article II, Sections 8. It stated:

We agree that Montana’s Constitution is to be broadly and liberally construed. *SJL of Mont. Assoc. v. City of Billings* (1993), 263 Mont. 142, 146, 867 P.2d 1084, 1086. Accordingly, its standing requirements are broad enough to allow anyone with a true stake in government action to exercise the rights granted by Article II, Sections 8 and 9. See e.g. *Air Pollution Control v. Bd. of Env. Rev.* (1997), 282 Mont. 255, 937 P.2d 463 (where we determined that, because citizens of Missoula who breathed the air into which Stone Container expelled pollutants had standing to challenge state regulation of emissions in the airshed, standing extended to the local air pollution control board charged with protecting public health); *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (where we held that health care providers had standing to assert on behalf of their patients the individual privacy rights of such patients to obtain constitutionally protected abortions from a health care provider of the patient’s choosing); and *Bryan v. District*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381 (where we rejected as “hypertechnical” the school board’s contention that a student’s mother lacked standing because another member of her activist group, rather than the mother herself, requested and was denied documents at issue in her challenge of a school closure). Such standing requirements are not, however, without limitation.

Why then did the Montana Supreme Court decide to rule that Fleenor did not have standing to challenge the Darby School District? Because Fleenor insisted no allegation of injury was necessary. So she made none. The Court notes in ¶¶ 11 & 12:

In fact, she does not even allege that the District's faulty notice somehow injured or threatened to injure her. And, other than establishing that Fleenor resides within the Darby School District, attends some school board meetings, and has no children in school, the record is completely silent as to her personal stake or interest in the matter of the hiring of the Superintendent. The "concrete adverseness" to Fleenor resulting from the District's actions, as called for in *District No. 55* and *Bryan* is completely lacking.

¶12 While the allegation of membership within the school district is a good start toward establishing standing, it is not, on its own, enough. Under *Bryan*, *Flesh*, and *Carter*, there must also be some sort of injury or threatened injury alleged. The threshold is not high, but it does exist, and Fleenor failed to meet it.

The State law, MCA § 60-3-321 (cited in ¶1, page 6 of the Petition) under which the complaint is filed requires that:

(1) The commission shall proceed, ... to make such investigation as it may deem necessary upon a complaint made against any public utility by ... any person, ... provided such person, is directly affected thereby, that:

- (a) any of the rates, tolls, charges, or schedules ... are in any way unreasonable or unjustly discriminatory;
- (b) any ... practices, or acts whatsoever affecting or relating to the production, transmission, delivery, or furnishing of ..., light, ... or any service in connection therewith is in any respect unreasonable, insufficient, or unjustly discriminatory; or
- (c) any service is inadequate. [Emphasis added.]

In its answer to the Petition, NWE denied the above emphasis placed on the statute by Petitioners. Ironically that denial had the effect of disavowing the emphasis Petitioners placed on the words "is directly affected thereby" which NWE now relies on in moving to dismiss on the conjecture that Petitioners are not directly affected by NorthWestern's actions.

The reason Petitioners emphasized those words was because Petitioners are directly affected by NWE's unreasonable and unjustly discriminatory rates, tolls, charges or schedules and practices relating to the furnishing of light. The Klingmans and Mr. Doty pay city taxes that are assessed as part of the property tax statement sent them from Yellowstone County. Included

in those charges are the city's and county's prorated share of street lighting assessments in dozens of lighting districts throughout the city and county. The alleged ownership overcharges have not only injured Petitioners property tax payers, renters, and rate payers in the past, but are injuring them now and will injure them in the future.

For example, the evidence will show that the city pays part of the street lighting bill in many lighting districts. Some of those costs are also defrayed by taxpayers in the districts. Where the city has property that is involved in a lighting district, it chips in to help defray the cost.

Since the unjust discriminatory NWE street lighting overcharges are reflected in those tax bills sent to every property taxpayer, Petitioners are directly affected and damaged by the overcharge. Further, Petitioners are damaged because their tax bills are higher than they would otherwise be if the local governments where they live were not being overcharged; higher than they would be if 50% of the energy needed to light Billings streets at night were eliminated.

NWE fails to acknowledge facts in good faith. The issue of where Petitioner's live comes up in NWE's brief. Yet NWE failed to respond to the Petition's ¶ 5, 7 & 9 factual allegations concerning residency in good faith—while relying on those same allegations in making its motion to dismiss. NWE denied allegations in paragraphs 5 and 7 of the Petition. Those paragraphs merely state the longstanding addresses where Petitioners Klingman, Doty, and Williamson live. Yet NWE contends it “is without knowledge or information sufficient to form a belief as to the truth of the averment” about whether Petitioners live at the addresses indicated.

NWE clearly is not without information to verify those addresses—even from its own billing records in the case of Klingmans and Dr. Williamson. If the Klingmans or Dr. Williamson had stopped paying their light bill, NWE would be able to trace them anywhere in the US

through its contacts with and membership in the National Association of Credit Managers, which maintains a vast secret database on the whereabouts of utility customers for bill collection purposes. Indeed, NWE was able to verify that Petitioner Doty was not a customer because NWE acknowledged that in its brief in support of the motion to dismiss.

Honesty in pleading required. “However, a party may not allege insufficient information or knowledge with impunity [as NWE has done here], but is subject to the requirements of honesty in pleading.” 61A Am Jur2d §340 citing *David v. Crompton & Knowles Corp.*, 58 F.R.D. 44 (E.D. Pa. 1973) [Bracketed material added].

“A party which attempts to claim a lack of knowledge or information sufficient to form a belief as to the truth of an averment, as permitted by FR Civ P, Rule 8(b), may be held to a duty to exert a reasonable effort to obtain knowledge of the fact in question.” 61A Am Jur2d §341 citing *Greenbaum v. U.S.*, 360 F. Supp. 784 (E.D. Pa. 1973) where the government was held to have admitted that the plaintiff was a business invitee when it failed to undertake even a minimal investigation, and failed to examine available, highly relevant government documents which indicated the truth of the matter pled.

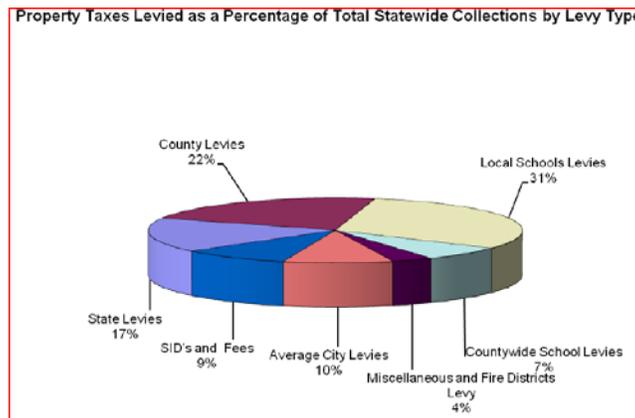
Thus, it has long been law that an answer asserting want of knowledge sufficient to form a belief as to the truth of the facts alleged in the Petition “does not serve as a denial if the assertion of ignorance is obviously a sham; in such circumstances, the facts alleged in the complaint stand admitted.” 61A Am Jur2d §340 citing *Harvey Aluminum (Inc.) v. N.L.R.B.*, 335 F.2d 749, 56 L.R.R.M. (BNA) 2982, 50 Lab. Cas. (CCH) ¶ 19179 (9th Cir. 1964).

Thus, the denial of facts in ¶s 5, 6, 7, 8, 9, and 10 concern Petitioner’s residency and their status as payers of local property taxes must be accepted as being admitted not only for the

purposes of deciding the motion to dismiss for lack of standing, but for purposes of the proceeding itself. So, the Commission is respectfully requested to rule that that is the case here.

Likewise the allegations of Petition ¶s 58, 59, 60 & 61 (discussed in conjunction with the *res judicata* arguments) must be accepted as being admitted.

Petition ¶s 6, 8, and 10 denied by NWE deal with Petitioner's status as taxpayers. NWE could easily have verified the assertion that property taxes pay for street lighting. The following chart found online⁷ indicates the percentage of property taxes that go for Special Improvement Districts (SIDs like the SILMDs (Special Improvement Lighting & Maintenance Districts)):



The pie chart also indicated money for city levies, part of which would pay for the city's prorate share of street lighting.

If it deemed it necessary within minutes, NWE could have obtained Petitioners Klingmans' and Doty's status as taxpayers by verifying it online as has been done below

⁷<http://revenue.mt.gov/revenue/forindividuals/property/documents/Understanding%20Property%20Taxes%20Information%20Sheet%20-%20Where%20Taxes%20Go.pdf>

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Owner Information

Tax ID: A11374
Primary Party
 Primary Owner Name: KLINGMAN, VERN L & PATRICIA G
 Mailing Address: KLINGMAN, VERN L & PATRICIA G
 1020 14TH ST W
 BILLINGS, MT 59102-5318
 Property Address: 1020 14TH ST W
 Township: 01 S Range: 26 E Section: 05
 Subdivision: NORMAN PARK SUBD 816 Block: Lot: 019
 Full Legal: NORMAN PARK SUBD, S05, T01 S, R26 E, Lot 019, LT 19 NORMAN PARK SUBD
 GeoCode: 03-0927-05-2-10-12-0000
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Property Assessment Information

Levy District: BILLINGS
Assessed value
 Assessed Land Vahe = \$ 46,634.00
 Assessed Building(s) Value = \$ 173,866.00
 Total Assessed Value = \$ 220,500.00
Taxable Market Value*
 Tax Year: 2009

Class Code	Amount
2201 - Residential City or Town Lots =	\$ 15,726.00
3501 - Improvements on Residential City or Town Lots =	\$ 91,817.00
Total =	\$ 107,543.00

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Owner Information

Tax ID: 1005601
Primary Party
 Primary Owner Name: DOTY, RUSSELL L
 Mailing Address: DOTY, RUSSELL L
 3878 N TANAGER LN
 BILLINGS, MT 59102-5916
 Property Address: 3878 N TANAGER LN
 Township: 01 S Range: 25 E Section: 11
 Subdivision: SHILOH VILLAGE SUBD 2ND FILING 812 Block: 008 Lot:
 Full Legal: SHILOH VILLAGE SUBD 2ND FILING, S11, T01 S, R25 E, BLOCK 008, 2004 CHAMPION 76X16 TITLE G293321 S/N 05-04-C78-08329 3878 N TANAGER 102 @C08661A
 GeoCode: 03-0926-11-2-01-05-9201
[Show on Map](#)

Property Assessment Information

Levy District: BILLINGS
Assessed value
 Assessed Land Value = \$ 0.00
 Assessed Building(s) Value = \$ 45,270.00
 Total Assessed Value = \$ 45,270.00
Taxable Market Value*
 Tax Year: 2009

Class Code	Amount
6201 - Personal Property Manuf, Mobile Homes =	\$ 25,192.00
Total =	\$ 25,192.00

The allegation was that Dr. Williamson is affected by local government taxes. He in effect pays them through the rent he pays at his residence.⁸ Also, it would have been easy for NWE to verify his present and former position at the University of Montana as alleged in Petition ¶ 8.

Commission rule on standing. The Commission has its own rule about who may file a complaint. It is found at A.R.M. § [38.2.2101 WHO MAY COMPLAIN](#), and provides:

(1) Complaints may be made by the commission on its own motion or by any person, having a legal interest in the subject matter, or any public utility concerned. Any public utility or other person likewise may complain of anything done or omitted to be done by

⁸ The Service list for this Docket should read 509, not 506 for Dr. Williamson's address.

the commission or any person over whom the commission has jurisdiction in violation of any law, rule, regulation or order administered or promulgated by the commission, pertaining to matters over which the commission has jurisdiction. [Emphasis added]

In a nutshell, Petitioners here complain that the jurisdictional utility failed to match its tariff with its depreciation schedule and that the Commission did not previously catch it, thus an overcharge was created.

The Commission has defined “person” in A.R.M. § 38.2.601(m) which provides:

(m) "Person" means any individual, partnership, corporation, association, governmental subdivision, or other identifiable public or private organization of any character who appears before the commission for any purpose, but who is not a party to the proceeding. [Emphasis added]

The last nine words of this definition should be voided as being illogical and promoting a circuitous denial of due process. If those nine words remain in the definition, then one who is a party to the proceeding could not be a “person” for purposes of having standing to be a party. So the definition is no help in resolving the standing issue unless the last nine words are omitted from the definition.

In the absence of a coherent Commission definition, let’s turn to the statutory definition of “person” that governs. It is found in the Montana Administrative Procedures Act M.C.A § 2-4-102(9) which says:

(9) "Person" means an individual, partnership, corporation, association, governmental subdivision, agency, or public organization of any character. [Emphasis added]

The Montana Administrative Procedures Act provisions govern the PSC pursuant to A.R.M. § [1.3.202](#), which provides, “(1) MAPA applies to all state agencies as defined in [2-4-102](#), MCA.

M.C.A. § 2-4-102(2)(a) says:

(2) (a) "Agency" means an agency, as defined in [2-3-102](#), of state government, except that the provisions of this chapter do not apply to the following:

...

(v) the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C. 252 and [69-3-837](#).

M.C.A. § 2-3-102 says:

(1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except: [Exceptions not relevant]

Thus the Commission is authorized by state statute to make “such investigation as it may deem necessary upon a complaint” filed by any “directly affected” person. Petitioners are such "persons." Additionally, the rules on standing, announced by the Montana Supreme Court, while applicable to lawsuits filed in Court, do not apply to this administrative proceeding as discussed in the ruling by Professor Corbett quoted below. Finally, assuming arguendo that judicial standing requirements are applicable to this administrative case, Petitioners have the proper standing to pursue the matters set forth in the Docket No. D2010.2.14 Petition.

A similar challenge to standing was made in an administrative law proceeding before the Commissioner of Political Practices, *Mary Jo Fox v. Brad Molnar*. In that case Mr. Molnar’s motion to dismiss based upon a lack of standing assertion was denied on April 2, 2009 by University of Montana Administrative Law Professor, William L. Corbett, who was serving as the hearing examiner in the case. Professor Corbett’s scholarly analysis of the federal and state law in that decision is quoted in part below. He wrote:

Without necessarily adopting all of the United States Supreme Court doctrine on standing, the Montana Supreme Court has relied on the U.S. Court's standing interpretations. *See Druffel v. Board of Adjustment*, 339 Mont. 57, 168 P.3d 640,643 (2007) (citing and relying on *Sierra Club v. Morton*, 405 U.S. 727 (1972)). Both Courts recognize that standing is premised on "two different doctrines: first, constitutional doctrines drawn from Article III of the United States Constitution, and second, discretionary doctrines intended to manage judicial review of legislative enactments. *Id.*

II. Standing as a Constitutional Doctrine

The first portion of the judicial doctrine of "standing to sue" is based on the Article III⁹ Constitutional directive that authorizes courts to hear and resolve only "cases" and "controversies."¹⁰ Because courts are limited to address only actual cases and controversies, the United States Supreme Court and the Montana Supreme Court have developed standards to determine whether a matter brought to it for consideration is an actual "case" or "controversy." Without addressing all of these constitutional standards, it is clear that for a federal court or a Montana state court to address a matter, the person bringing the action must have suffered an "injury" that was "caused" by the challenged action, and the challenged action can be "redressed" by the decision of the court.¹¹ Again, both the United States Supreme Court and the Montana Supreme Court have defined and provided standards to determine whether the person bringing the court action has suffered an "injury."

For actions initiated in federal court, the United States Supreme Court requires that an "injury" must be concrete, particularized and present a past or imminent injury. The Montana Supreme Court has required similar standards. For a Montana court to have standing, the injury presented for adjudication must not only have occurred, or be imminent, to the person bringing the action, but the injury must, in some way, be unique or particularized to that person. Thus, to have standing, the person bringing the action must be able to demonstrate that her injury was in some way particular to her, of a kind or magnitude not suffered by the public at-large. See *Fleenor v. Darby School District*, 331 Mont 124, 127, 128 P.3d 1048, 1050 (2006).

⁹ Article III of the United States Constitution creates and authorizes the Federal Courts as a branch of the federal Government and determines the jurisdiction of those courts.

¹⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("The judicial power, Art. III, §1 (of the Constitution) ... limits the jurisdiction of federal courts to "cases" and "controversies "

¹¹ In federal court:

Plaintiff must have suffered an "injury-in-fact" ----and invasion of a legally-protected interest which is (a) concrete and particularized, ... and (b) "actual or imminent, not 'conjectural' or hypothetical." Second, there must be a causal connection between the injury and the conduct complained of- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely "speculative," that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61.

In Montana state court:

To establish standing ... the complaining party must (1) clearly allege past, present, or threatened injury, and (2) allege an injury that is distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party. [However,] persons who fail to allege any personal interest or injury, beyond that common interest of all citizens and taxpayers lack standing. [Thus, the] injury alleged must be personal to the plaintiff distinguished from the community in general [and] result in a 'concrete adverseness' personal to the party staking a claim in the outcome. *Fleenor v. Darby School District*, 331 Mont. 124, 127 P.3d 1048, 1051 (2006).

However, the Article III Constitutional requirements for standing are applicable only to judicial proceedings, not administrative proceedings. In this case the authority of the Commissioner, a Montana State administrative official, is conferred by the Montana state legislature, not the Constitution, and jurisdiction is conferred upon him, by the legislature, as an administrative officer of the State of Montana. Article III, considerations--applicable only to courts--do not apply in this case. [Emphasis added]

III. Standing as a Matter of Statutory Interpretation

Apart from Article III, constitutional considerations, a person bringing any action in court, based on an alleged violation of a statute, must demonstrate that the interest he asserts is recognized by the statute itself. *See Air Courier Conference v. Postal Workers Union*, 498 U.S. 517 (1991).

...

Since legislative bodies have the power to create legally-cognizable rights and interests by enactments of law, they have the power to determine the nature and extent of the interests created or protected. In *Air Courier Conference*, the Court determined that Congress did not intend that its enactment was to protect jobs. In this context, what has been referred to as "statutory standing," is in reality asking whether a plaintiff's cause of action or claim for relief is recognizable (within the zone of interests) by the statute, and thus, involves determining legislative intent.

IV. Application of the Standing Doctrine to this Case

Again, like the constitutional standing issue, legislative standing (the zone of interests test) is used by courts to determine whether they should interject themselves into a controversy. Whether a court has standing to interject itself, is a much different question than the issue presented here. Here the Respondent alleges that the administrative body created by the legislature to police and enforce "public trust duties" may not hear a matter brought by the Charging Party, a Montana citizen, against the Respondent, a Montana public office holder.

The Montana legislature provided that Montana public office holders and public employees have a duty of public trust to the people of the state. Section 2-2-103, MCA. The legislature provided that "a person" alleging a breach of this duty may bring a "complaint with the Commissioner of Political Practices " Section 2-2-136 MCA. The issue that the Respondent raises is whether the Charging Party is a proper "person" to bring a complaint against the Respondent, and whether the interests the Charging Party asserts are within the interests recognized by the legislature. It is determined that she is a proper party and the interests she asserts are recognized by the statute in question.

... The Charging Party alleges that she lives in the political district represented by the Respondent and has a particularized interest in her complaints against the Respondent; she is a constituent of his, and a prominent supporter of his opponent in the last election.

NWE's brief relies on *Chovanak v. Matthews*, 120 Mont. 520, 527, 188 P.2d 582, 586 (1948). More recent Montana case law calls into question and effectively overrules the 1948

Chovanak decision and the 1977 *Stewart v Bd of Cty. Com'rs of Big Horn Cty.* (1977), 175 Mont. 197, 573 P.2d 184 decision also relied on by NWE.¹²

Therefore, not only does standing for Petitioners flow from the PSC statute set forth above, but clearly it flows from the *Helena Parents Comm'n v. Lewis and Clark County Comm'rs.* 277 Mont. 367, 922 P.2d 1140 (1996), which strangely enough is also cited by NWE.

In the *Helena Parents* case, Justice Trieweiler specifically rejected the lower court's reliance on *Chovanak* in dismissing the *Helena Parents* case for lack of standing. He noted that in relying on *Chovanak*, the lower court in *Helena Parents* had "failed to consider that 'the injury need not be exclusive to the complaining party,' Sanders, ___ Mont. at ___, 915 P.2d at 198 and failed to consider *Lee v. State*, (1981), 195 Mont. 1, 635 P 2d 1282." Likewise NWE did not consider *Lee* in its analysis.

In addition, the law of standing has been expanded since *Lee* in 1981, most notably by

¹² For historical exceptions to the *Chovanak* and *Stewart* line of cases see [Grossman v. State \(1984\)](#), 209 Mont. 427, 682 P.2d 1319, 41 St.Rep. 804. where Justice Sheehy noted (at p. 1321) That Grossman was a self-employed citizen and resident of the United States, and Townsend, Broadwater County, Montana. "He owns real and personal property on which he pays the State and its subdivisions real and personal property taxes. He also pays the State income tax on his earnings."

Grossman was challenging "the constitutionality of various aspects of the State's coal severance tax bond program." The State could not "issue any of the proposed coal severance tax bonds authorized by the legislature until the issues raised by the plaintiff" had been resolved by the Court;

Respondents did not object to Grossman's complaint on the ground that he has no standing. However, the Court raised that issue on its own motion (*sua sponte*). The Court concluded (at p. 1325): There is no question that this Court will recognize standing in a taxpayer who is directly adversely affected by a proposed assessment and levy of taxes upon him. [State ex rel. Conrad v. Managhan \(1971\)](#), 157 Mont. 335, 338, 485 P.2d 948, 950.

... See also, [citing examples].

The rule that a taxpayer must be directly adversely affected to bring an action contesting the validity of state bonds or the use of tax monies is not as unbendable as our pronouncements in *Chovanak* and *Stewart*, make it seem.

[citing examples] ...

From these cases it will be seen that we must add a further exception to the strictures on standing announced in *Chovanak* and *Stewart* above. We will recognize the standing of a taxpayer, without more, to question the state constitutional validity of a tax or use of tax monies where the issue or issues presented directly affect the constitutional validity of the state or its political subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof. [Emphasis added]

Gryzcan v. State of Montana, 283 Mont. 433, 442-46, 942 P.2d 112, 118-19 (1997), which is discussed in depth below.¹³

In addressing the “no interest aside from the interest of the public generally,” threshold to be met to establish standing for a declaratory judgment action or review generally in *Helena Parents*, *supra* at p. 1140, headnote 7, Justice Trieweiler wrote that “[t]he requirement that a plaintiff demonstrate an injury ‘is **most easily satisfied if a plaintiff alleges either a direct economic injury** or’” [Emphasis added]

And while the alleging of economic injury is one of the methods which most easily satisfies the standing requirement other methods of establishing standing are also available.

In practice then, *Helena Parents* and *Grossman* have effectively overruled *Chovanak* to the extent that *Chovanak* may have previously restricted taxpayer standing.

A recent comprehensive statement of the law of standing in Montana was set forth in the 1997 *Gryzcan* case cited above. There in sustaining an injunction against enforcement of a sodomy statute challenged by homosexual persons (who had not been prosecuted or threatened with prosecution under the statute), the Court opined:

The test of whether a justiciable controversy exists is: (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interests; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and (3) the controversy must be one the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to

¹³ In *Lee*, *supra*, that plaintiff had standing to challenge the 55-mph speed limit even though he had not been arrested for speeding, because otherwise, legislative acts that affect large segments of the public would be insulated from judicial attack. *Lee*, 635 P.2d at 1285. **Failure to acknowledge the rule in *Lee* and thus failure to grant standing to Petitioners here would insulate unscrupulous utilities from challenges before the very body that was created to rein in their excesses, leaving them free to overcharge with impunity simply because the bulk of other directly affected individuals do not understand the often arcane and complicated stuff of utility ratemaking or because they do not have the economic resources individually to assert a claim in expensive ratemaking proceedings.**

constitute the legal equivalent of all of them. *Lee v. State* (1981), 195 Mont. 1, 6, 635 P.2d 1282, 1284-85 (citing *Matter of Secret Grand Jury Inquiry* (1976), 170 Mont. 354, 357, 553 P.2d 987, 990). [Emphasis added.]

Petitioners in this case are directly affected by NWE's overcharge, by the unconscionable contracts NWE imposes on the city of Billings and Missoula; by NWE's failure to offer LED lighting service not only in existing districts, but in future districts where Petitioners may wish to receive street lighting service; and by the contribution to global warming and CO2 emissions that NWE's failure to take reasonable measures to curb greenhouse gases causes as pled in Petition ¶ 92.

All 14 of those direct effects of increasing CO2 alleged in ¶ 92 were denied by NWE in its answer. Those effects were denied despite the fact that most of them have been part of the Fourth Intergovernmental Panel on Climate Change Report drafted by 1250 principle scientific authors and 2,000 scientific expert reviewers who considered more than 90,000 comments on the IPCC Report before it was finalized. The direct effect allegations of excess CO2, which is now at the highest level it has been at for 800,000 years, were denied by NWE despite the fact that 18 American Scientific organizations support the consensus view that human caused CO2 production resulting from the burning of fossil fuel is having an observable direct effect on global warming that is a growing threat to our world.

This matter is of such overriding public moment as to constitute the legal equivalent of all of the standing tests. That is, denial of standing will strip Petitioners of their Article II, § 3 and § 34, Montana Constitutional right to a clean and healthful environment and to protect their property from unlawful utility rate gouging. Those Constitution sections provide:

Section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include the **right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and**

happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. [Emphasis added.]

Section 34. Unenumerated rights. The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.

The main remedies to redress the denial of the Constitutional rights at issue here are a Petition to the Public Service Commission MCA § 69-3-321.

Thus the opportunity to cut CO2 emissions from nighttime lighting by 50% is an issue “of such overriding public moment as to constitute the legal equivalent of all of” the other standing thresholds mentioned in *Gryzcan*. And under the overriding public moment doctrine would afford Petitioners standing.

In addition, pursuant to the rule in *Air Pollution Control v. Bd. of Env. Rev.*, *supra*. Petitioners would be accorded standing not only because they are alleging ongoing economic harm, but because pollutants which cause climate change, like the pollutants in the air we breathe, provide a basis for standing. The *Air Pollution Control* case then, provides an additional basis for standing for Dr. Williamson. He has a personal interest in curbing climate change that has evolved from his service as the former Dean of Technology at the University of Montana and from his service as the Director of Alternative Energy Research there. The statute is meant to allow persons like Dr. Williamson, and Mr. Doty with special expertise to challenge state regulation that allows utility overcharges to fund excess use of fossil fuel when viable, cost-effective, more energy efficient alternatives are available. Petitioners are clearly within the zone of interest that the statute is intended to protect. And they have standing to protect the rights of others in the general rate paying public who do not have the scientific or ratemaking expertise to bring action on their own behalf. *Singleton v Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

Addressing the first *Gryzcan* test we see that Petitioners have a genuine direct interest in the outcome of this case. As evidence of past harm, they cite not only direct economic overcharges, but climatic effects alleged in ¶s 92, c, d, e, f, g, i, k, l, & n. That injury need not be major as long as it is identifiable and suffered in fact. *U.S. v SCRAP*, 412 U.S. 669 (1973)

To address the second *Gryzcan* test, the Commission may readily determine that this controversy is one upon which its judgment may effectively operate. It can eliminate the ownership overcharge, void unconscionable contract provisions, restore electric consumer's right to use utility infrastructure they have paid for, chart a path to energy conservation in street lighting that will not increase utility rates, and breathe vitality into future street light tariffs by shaping them to provide market incentives that allow LED street lighting to become as much a part of reality as they are now in other parts of the world.

Third, the Commission's determination will have the effect of a final judgment in law upon not only Petitioners' pocketbook as past ratepayers, but as future ones, and upon the rights of all other future persons who depend on government to make decisions that will reduce CO2 emissions to help thwart the results predicted in ¶ 92. Also, present and future utility managers and their attorneys will better know the requirements of demand side management as applied to street lighting.

FAILURE TO STATE A CLAIM CONTENTION

NWE moved to dismiss alleging Petitioners had failed to state a claim because they "can prove no set of facts that would entitle them to relief."

"Where a complaint states facts sufficient to constitute a cause of action upon any theory, then the motion to dismiss must be overruled." *Duffy v. Butte Teacher's Union No. 332*, 168 Mont. 246, 253, 541 P.2d 1199, 1203 (1975).

The Court also upheld the trial court's refusal to grant the motion to dismiss in *Willson v. Taylor*, 194 Mont. 123, 634 P.2d 1180 (1981) stating at 1183, "This Court does not favor dismissals on pleading, and recognizes that the defendant can obtain additional information required."

Petitioner allege in numerous paragraphs that the ownership charge will have paid for utility infrastructure in various amounts of time depending on the economics involved. NWE denies these allegations. NorthWestern's even denied Petition ¶ 27 which averred: "At some point in time, the ownership charge that Northwestern levies will completely cover the total costs of providing the street lighting infrastructure and repay Northwestern Energy for its investment." Think about that denial for a moment. Does anyone really believe that NWE set things up to lose money--so that the ownership charge will never cover costs?

Thus, ¶ 27 must be added to the list of Petition paragraphs that must be taken as admitted not only for purposes of the motion to dismiss, but for the case as a whole and for proof that NorthWestern's Answer was a sham pleading.

Since the ownership charge will at some point pay for the street lighting infrastructure with allowed interest, the question is when will that occur. Petitioners can prove that and also prove that once that occurs, the ownership charge must cease under original cost depreciated ratemaking.

Also Petitioners allege in ¶ 65 that LED street lights are 15-70% more efficient than the high pressure sodium lights now owned by NWE. That pleading must be taken as true and Petitioners allowed to prove it.

NWE claimed it was without information to know whether what it called "speculative" ¶ 64 allegations were true. Paragraph 64 alleged "**Energy Independence:** Adoption of new energy

saving infrastructure technologies, such as LEDs, can play an important role in helping the United States and the State of Montana to achieve their goals to become more energy independent and to generate less CO2.” Apparently NWE does not believe a 15-70% reduction in street light energy use will generate less CO2. It seems to Petitioners like a no-brainer that should have been admitted if NWE's Answer were genuinely focused toward narrowing of issues as required by the rules of pleading. Nevertheless, since it is not admitted, and unless the Commission accepts it as fact, Petitioners should be allowed to prove it.

CLASS ACTION

NWE contends petitioners have not certified a class. That’s true. No Commission Rule or Montana Administrative Procedure Act Rule provides for how that is to be done.¹⁴

Perhaps the Commission would act pursuant to MT.R.Civ Proc., Rule 23(c) and find that pursuant to MT.R.Civ Proc., Rule 23(a):

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

And that pursuant to MT.R.Civ Proc., Rule 23(b):

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

¹⁴ The Montana Department of Labor and Industry (A.R.M. § [24.8.740](#)) and Department of Public Health & Human Services (A.R.M. § [37.49.502](#)) have Rules on Class Action. The former looks to Rule 23 for guidance.

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Once that is determined, perhaps the Commission would give notice to the resulting class pursuant to the request made in ¶s 11 & 12 of the Petition and further rule that such notice is sufficient for purposes of this class action?

The *Helena Parents* case involved a class action. The standing question there involved whether the parents had standing to seek a declaratory judgment. While their interests were somewhat different, they had a common interest. Further, the Court said, “Not only have we held that the harm need not be exclusive to the plaintiff, but the United States Supreme Court has also held similarly.”

So the discussion encompassed “members of a class where the harm need not be exclusive,” rather than the “if it is exclusive, no standing can be found” type of interpretation that NWE is trying to stretch from the case.

The harm test for standing is an “injury in fact test.” Where the injury comes from is irrelevant. This is not an abstract intellectual problem. It is a concrete living contest between adversaries that has happened in the past, is happening now and will continue to happen unless something is done to eliminate the ownership overcharge after the street lighting infrastructure is paid for. **Here the injury that Petitioners and Montana rate and tax payers have been and will continue to be subject to, namely a regulatory body’s failure to catch the mismatch in a utility’s tariff with its depreciation schedule which created an overcharge.**

In *Federal Election Commission v. Akins*, 524 U.S. 11, 21, 141 L Ed 2d 10, 20, 118 S.Ct. 1777 (1998), the injury in fact consisted of the respondents inability to obtain donor lists of a political interest group engaged in affecting elections. The FEC had ruled that the group, the American Israel Public Affairs Committee, was not required to report such things. The respondents appealed the discretionary decision as they were allowed to do under specific law governing the FEC.

While the specific law governing review in that case was not a ratemaking statute, the principles governing standing in the *FEC* case are applicable here. If deprivation of information is an injury in fact, then the deprivation of the right to have energy efficient street lighting and fair utility rates is also an injury in fact.

Justice Breyer wrote for the 6 judge majority in the *FEC* case:

. . . where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’ . . . This conclusion seems particularly obvious where (to use a hypothetical example) . . . large numbers of voters suffer interference with voting with voting rights conferred by law. *FEC v. Akins*, 524 U.S. at 24, 141 L Ed 2d at 22 & 23.

Interestingly, the *FEC* case [at 524 U.S. 25] also distinguishes *Heckley v. Chaney*, 470 U.S. 821, 84 L.Ed2d 714, 105 S. Ct. 1649 (1985) Justice Breyer noted:

If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency’s action and remand the case--even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 L. Ed 626, 63 S.Ct. 454 (1943). Thus respondents’ “injury in fact” is “fairly traceable” to the FEC’s decision not to issue its complaint, even though the FEC might reach the same result exercising its discretionary powers lawfully.”

INTERIM RELIEF

Am I the only one who thinks it is incongruous for NorthWestern to quote the statute (M.C.A. § 69-3-304) granting the Public Service Commission the right to “temporarily approve increases or decreases pending a hearing or final decision” and then claim no legal basis justifies

decreases because Commission rules only “speak to rate increases?” Petitioners are not prevented from seeking what the statute allows just because rate decreases are so rare that they are not addressed in Commission rules. A rulemaking is not required before this statute becomes effective.

NorthWestern claims to “be entitled to due process in a proceeding that will adjudicate” its “property interests. Petitioners’ agree. This is that proceeding. By all means give NWE a chance to be heard, make it aware that its overcharges are about to go away unless its *prima facia* rate is justified in the face of irrefutable evidence that the original cost depreciated of a large percentage of its street lights has been completely covered by the ownership charge. **The interim rate relief sought only applies to stopping future charges that are demonstrably excessive, not to refund of past excessive charges—the latter charges being subject to a full hearing pursuant to the requests in Petitioner’s request for relief.**

It’s ironic that NWE is advocating full hearings for interim rate decreases based on Commission rules. Where was NWE when A.R.M. § 38.5.504 on Hearings in interim rate increase requests was repealed? Also, I’m guessing that NWE was around when A.R.M § 38.5.508 became part of Commission rules. So its attorney’s know that the “commission, in its discretion, may at any time, waive any or all of these rules.”

Prima facia rates issue. At this point in its brief, NWE throws in a *non sequitur* by asserting that M.C.A. § 69-3-110(2) provides:

(2) All rates, fares, charges, classifications, and joint rates fixed by the commission shall be enforced and are *prima facie* lawful from the date of the order until changed or modified by the commission or in pursuance of part 4.

That does not mean NWE rates are set in stone forever. The words “*prima facia*” only mean that the rates are presumed to be lawful until that fact is disproven. *Black’s Law Dictionary* (4th ed., 1957) indicates *prima facia* means:

At first site; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

Petitioners in this case have met the burden of rebutting *prima facia* evidence by pleading contrary facts and they will prove the contrary facts during any proceeding in this case.

Further the original Commission order¹⁵ granting Montana Power’s request to replace utility owned street lights with high pressure sodium (HPS) lights foresaw the possibility of more efficient lights than HPS street lights coming to market. In ¶ 200 of that order, the Commission noted:

200. Nothing in this order shall prevent MPC from converting technologically obsolescent lights to more efficient lights than HPSV should the state-of-the-art change in the next seven years. Additionally, if practicable, MPC should include the necessary on/off controls with the new HPSV installations and with HPSV conversions.

While ¶ 200 talks about only the next seven years, it can be ascertained from wording that the Commission was intending to be practical about adopting state-of- the-art technology. The earlier Commission did not intend to limit changes in street lighting to HPS technology.

Due process for consumers. Petitioners also assert that NorthWestern’s customers, like NWE, are entitled to due process. Due process for consumers may not be available to recover overcharges unless an interim decrease is ordered. It is doubtful that NWE would stipulate to refunding the overcharge if the Commission did not order an interim rate decrease and later found a decrease justified.

¹⁵ DOCKET NO. 82.8.54, ORDER NO. 4938a, pp. 56-60

Due process for consumers means that they must be informed of the fact that NorthWestern's street light tariff has paid for the street lighting infrastructure in approximately 85% of the utility-owned lights. Petition ¶s D, E & P seek that notice. Due process for the consumer means that they have a right to a hearing on whether or not that rate gouging should be allowed to continue. This is that hearing.

Due process means equal treatment. The utility for years has been afforded interim increases, subject to refund if the increase was excessive. Therefore, the customers are entitled to interim decreases, subject to additional payment if the decrease is excessive. If due process is present in the case of the many interim increases granted NorthWestern and its predecessor, then due process can also be present in the case of decreases.

Interim decrease justified. In this case the evidence will show that the interim decrease is not likely to be excessive because Petitioners are requesting that it only apply to future charges in lighting districts or areas where the street lights have been completely paid for by the ownership charge. The knowledge of what street light districts would be involved in the interim decrease is within the exclusive purview of NorthWestern. The issue of refunding past overcharges will be part of the proceeding beyond the interim relief request.

If one knows the original average cost of street lights in a district, the monthly charge being levied for those lights, the length of time the payments have been made, and the allowed rate of return, then one can easily calculate the districts where the interim rate decrease should apply. It may take NorthWestern some time to arrive at those figures. However, it should be ordered to begin the process of gathering that data now; adjusting future charges to reflect the fact that certain lights have been paid for; and refunding money overpaid, to the date of the interim rate decrease order, and later, after a full hearing, to the date the overcharge began.

NorthWestern is attempting to rely on doctrines similar to laches and estoppel in perpetuating its overcharge by claiming that its street lighting tariff contains Commission approved rates. Those rates were initially implemented as interim rates way back in 1982 when the Commission approved a temporary street lighting tariff in Docket No. 82.8.54, Order No. 4938a, pp. 56-60. There NWE's predecessor, Montana Power, sought permission to install high pressure sodium lights. Consideration of unfinished street lighting matters in that docket was continued in Docket # 83-9-67, Order 5051f, p. 31-33

In ¶s 105 & 106 of that Order, the Commission said it could:

“only wonder where the proposed Metered and Flat-demand outdoor lighting customers are currently billed, and how the proposed revenue requirement was arrived at without accurate billing determinants.

107. If at a later date billing determinants can be quantified, the Commission shall reconsider these rate schedules.

According to a subsequent Order (5051g) in that docket, the utility admitted it was “unable to implement, in correct detail, the Streetlight Rate Schedules (SL-1 (84p) and SL-2 (84p)).”

Then the Commission found, “**The Company's proposed resolution** of this problem **is to adjust upward (by roughly 50 percent) the existing tariff rate component, but on a temporary basis.**” [Emphasis added]

So the utility wanted a “temporary” 50% street lighting tariff rate increase because it couldn't provide the correct detail to justify its SL schedules which were the forerunners of present rate schedules.

Well Petitioners can provide the needed detail concerning the ownership charge. And even though it has taken decades for that needed information to come to light because of the arcane, obscure, and complicated nature of utility ratemaking, Petitioners are entitled to a refund

under the interim rate statute. An interim order was granted to allow increases including the increase involving street lighting. It has now turned out that too much was allowed because it allowed an ownership charge that provided the utility with more than it was entitled to.

Therefore, under MCA § 69-3-304 the Commission may now order a rebate.

In Docket No. 87.4.21, Order 5340c, pp. 9 & 10, (¶ 26. Lighting.) The Commission found “The Company is not proposing to change the current rate structure of its street lighting, post top lighting, and yard lighting tariffs.” The Commission therefore accepted (in ¶ 59) the utility’s “proposed methodology for determining tariffs for its various lighting classes“ because “MPC's tariff proposals for its various lighting classes were uncontested in this proceeding.”

That determination is understandable because at that point the ownership charge would not have been in existence on the new HPS lights to have paid for them, so consumers would not have had reason to anticipate the overcharge. Regardless, the fact that the methodology was uncontested at the time is excusable because the latent defects in the methodology had not yet surfaced.

The ownership charge defects had not surfaced by the time of Docket # 90-6-39, Order 5484n, either. In that Docket, the utility was ordered to develop a metered tariff so customers could limit their use of nighttime lighting if they wished. In addition, the Commission directed:

MPC to analyze and testify on the merits of selling its company-owned street lighting plant to customers (e.g., cities) at original cost less depreciation. This option would allow customers the opportunity to replace worn out plant, bulbs and other routine maintenance instead of having MPC perform the same.

In summary, the statute provides that interim rates may be adjusted if it is later determined that they were not correct. In this case, Petitioners will contend in the main part of the proceeding that past overcharges must be adjusted under this law. The interim street light rates, based on incomplete information have turned out to have created an overcharge—one

which for whatever reason was not apparent at the time NorthWestern first proposed its street light tariffs. Now that the discrepancy has become apparent, the law allows for an adjustment of those originally “temporary” rates. Again, the doctrines of laches or collateral estoppel do not apply. They are equitable doctrines upon which NWE cannot rely because it does not come before this ratemaking tribunal with clean hands. A utility with clean hands would have matched its depreciation schedules with its tariff rates so an overcharge would not occur.

Case not ripe for injunction. NWE continues its opposition to the request for temporary interim relief by mischaracterizing Petitioners’ request as one for a temporary injunction. The word “injunction” does not appear in the Petition. Thus, a need to file in District Court will not exist unless the Commission rules against Petitioners on the interim rate relief issue.

Petitioners are raising the interim rate issue pursuant to M.C.A. § 69-3-304 – not § 69-3-403 quoted by NWE.

Due process for consumers means they should not have to post a bond as NWE so outrageously suggests to prevent an overcharge. Consumers have already posted a bond--millions of dollars of past ownership overcharges.

Indeed, if Petitioners were to file for immediate injunctive relief from the ongoing ownership overcharge without first exhausting administrative remedies by bringing the matter to the Commission for correction, NWE would be interposing objections in the District Court. NWE would then claim that Petitioners had not only failed to exhaust administrative remedies but that the time for seeking appeal and an injunction on appeal of the Commission rate had passed. NWE would argue that the special expertise of the Commission should be respected by the Courts. These are old tricks of utilities—run consumers around to other forums, exhaust consumer resources, mischaracterize Petitioner claims, throw in *non sequiturs*. They won’t work

here. Petitioners are in the correct forum to begin this request for relief. The issues are not ripe for the injunctive relief discussed in NWE's attempt to school Petitioners.

In concluding, NWE contends that a comprehensive review of all of NorthWestern's rates is necessary prior to granting of an interim adjustment. That's not the purpose of the interim adjustment statute. NWE would be hard pressed to point to even one instance where a comprehensive review of all of NorthWestern's rates prior to the granting of the many interim rate increases it has enjoyed. In this case the revenue from the ownership charge pays exclusively for street lighting infrastructure. So revenue and expenses for street lights is all that has to be considered in order to make an adjustment. The requested interim adjustment does not affect charges for energy, transmission, distribution, or USB charges, etc. It only affects a very specific component of the rate.

Once the ratebase of utility street lighting plant is written down to reflect what has in reality already been paid for (and the depreciation schedules adjusted to match the payments made to amortize the cost of street lights), there will be no need for other customer classes to pick up the slack in the revenue requirement. That is, an interim rate adjustment, correctly applied should not bring about a corresponding revenue requirement adjustment in other rate classes or for other rate components because rate base will be adjusted downward to reflect the fact that street lighting infrastructure has been paid for. Thus the revenue requirement will shrink correspondingly.

However, as the energy component of street lighting begins to taper off by 50% with the implementation of LED lighting, the cost allocations to the non-ownership charges of various components of the street lighting class will become overstated. That is, the street lighting class will be paying more than its share of those allocated costs because it will be using less energy

and creating less demand than previously. At some appropriate future time the Commission may wish to address that projected imbalance so the rates to the street lighting class correctly reflect their actual usage.

Other Affirmative Defenses: NorthWestern Energy (NWE) claims several affirmative defenses, namely res judicata, that plaintiffs lack standing, that the statute does not allow for interim rate decreases, that an interim rate decrease would deny NorthWestern due process, and that Petitioners' claims are barred by estoppel, illegality, laches, release, and/or waiver.

Petitioners move to strike all of these defenses. None of these defenses protect NWE against having to stop its unreasonable and unjustly discriminatory and therefore unlawful street light overcharge. Neither do they prevent Petitioners from seeking in a ratemaking proceeding to bring up requests neither pled nor considered in a rulemaking proceeding. They do not prevent reexamination of facts NorthWestern misrepresented in the rulemaking. And it does not prevent a reexamination of new information that will bear on the decision in the ratemaking that was not reasonably available or ignored by the Commission in failing to act on the motion for reconsideration in Docket No. N2009.4.45.

No Waiver. The doctrines of waiver and estoppels do not apply in this case. Waiver is the intentional or voluntary relinquishment of a known right. No knowing relinquishment of the right to protest an overcharge exists here. No affidavit of NorthWestern sets forth facts on which to rest NorthWestern's averment.

Blacks Law Dictionary, 4th Ed. 1951 notes: "To make out a case of implied waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amounting to an estoppel on his part." Rosenthal v. New York Life Ins. Co., 99 F. 2d 578, 579 (C.C. Mo.). No waiver occurred here so this defense must be stricken.

The doctrines of estoppel, laches, and/or waiver are all equitable principles. The entity invoking them must come into the tribunal with “clean hands.” Therefore, an admitted monopoly that has failed to synchronize its tariffs with its depreciation schedules does not have clean hands because its act has created an unlawful overcharge.

No illegality. In order for the defense of illegality to be upheld here, there would have to be a complete defect in the proceedings. As indicated throughout, the proceedings are proper and the illegality defense must be stricken. If anything NWE's rate gouging is indicative of a completely defective prior ratemaking process which ought to make illegality an affirmative defense of Petitioners against any *res judicata* assertion.

No release. In order for the defense of release to be upheld here, there would have to be a knowing relinquishment. In addition the release of the right to challenge the unlawful rate would have had to be supported by lawful and valuable consideration. Consumers did not agree to receive nighttime lighting in exchange for being overcharged. Since no knowing, valuable consideration was exchanged, the release defense must be stricken.

SUMMARY

Therefore, Petitioners respectfully request the Commission to deny the motion to dismiss, to grant Petitioner’s motions to strike erroneous statements in the answer and all affirmative defenses, to accept various averments in the pleading as fact, to require an amended answer, to certify a class, and to require stockholders to pay NorthWestern’s attorney’s fee..

Respectfully submitted,

April 1, 2010

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AFFIDAVIT

I, Russell L. Doty, being first sworn and under oath, state that the facts stated in the above Brief and affidavit are true and correct to the best of my belief.

Russell L Doty

Subscribed and Sworn to before me on April 1, 2010 by Russell L. Doty.

Notary

My Commission Expires:

CERTIFICATE OF SERVICE

I, Russell L. Doty, certify that on April 1, 2010, a true and accurate copy of the foregoing **AFFIDAVIT & BRIEF IN OPPOSITION TO NORTHWESTERN ENERGY’S MOTION TO DISMISS, AND IN SUPPORT OF PETITIONER’S MOTION TO STRIKE AFFIRMATIVE DEFENSES** was served upon the parties listed below by depositing it, postage prepaid, in the US mail.

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