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Case Number: DA 20-0570

IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO. DA 20-0570

JAMES T. & ELIZABETH GRUBA and LEO G. & JEANNE R. BARSANTI, Petitioners/Appellants, vs. MONTANA PUBLIC SERVICE COMMISSION, Respondent/Appellee. & NORTHWESTERN ENERGY. Respondent/Appellee.	))))))))	**APPELLANTS' REPLY BRIEF**

ON APPEAL FROM ADMINISTRATIVE AGENCY DECISIONS IN MONTANA PUBLIC SERVICE COMMISSION DOCKET D2010.2.14, & FROM THE FIRST JUDICIAL DISTRICT COURT LEWIS & CLARK COUNTY, MONTANA, DOCKET DDV-2019-319, HONORABLE JAMES P. REYNOLDS PRESIDING

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REPLY TO STATEMENTS OF ISSUES

The PSC and NorthWestern (NWE) did not cross appeal. They both reduced the five issues Grubas appealed to three and restated them.

If issue statements are similar, due process entitles Grubas to resolution of an issue as they stated it because they appealed it. There was no cross appeal and no compelling reason to change Grubas' issue as stated. This relates to:

1) Grubas' Issues 1 & 3 restated by PSC's Issue 3;
2) Grubas' Issue 2 restatement by NWE's Issue II, the PSC's failure to follow §38.5.106, ARM;
3) Grubas' Issue 3, PSC and NWE, *ultravires* acts, discussed regarding refunds in PSC Issues I & II;
4) Grubas' Issue 4 restatement by PSC's Issue 2a and NWE's Issue 3, PSC's use of an erroneous staff memo without allowing comment, and
5) Grubas' Issue 5 restatement by PSC's Issue 2b and NWE's Issue 2, the PSC's failure to allow competitive streetlights on NWE poles.

When no cross appeal is filed, if issue restatements are "separate and distinct from the issue appealed," this Court rejects consideration of them. *State v. Branam*, 148 P.3d 635, 641, 2006 MT 300, ¶ 28, 334 Mont. 457, ¶ 28 (2006) [citations omitted].

REPLY TO STATEMENTS OF THE CASE

NWE's Statement of the Case needs supplementing. NorthWestern's statement says: "The Commission's order found that NorthWestern's street lighting rates were lawful and that Grubas had failed to prove their allegations to the contrary.[1]

To be more accurate NWE's Statement of the Case ought to have included

[1] NWE Answer Br., pp. 1 & 2.

undisputed Gruba Statement of Facts 5 through 7,[2] namely:

5) On November 23, 2018, after the PSC hearing, Complainants requested the PSC make 155 findings of fact, 21 conclusions of law and 24 order paragraphs.[3] On October 3, 2019, Complainants asked the District Court for 150 findings of fact, 38 conclusions of law, and 24 order paragraphs.[4] In extensive footnotes in each request, Complainants documented the paragraph in their 2nd Amended Complaint[5] where a fact or conclusion was specifically alleged and where in the record it was proven.

6) §2–4–704(2) , MCA, provides:

(2) … **The court may reverse or modify the decision if** substantial rights of the appellant have been prejudiced because:

…

(b) **findings of fact, upon issues essential to the decision, were not made although requested**. [Bolding added]

7) Neither the PSC nor the District Court made the specific findings requested by Complainants. Therefore, this Court is asked to review those findings and make modifications allowed by the statute, finding them to have been proven.

Since Grubas' Statement of the Case is unrebutted and more complete than either Answer Brief, please adopt it.[6]

REPLY TO STATEMENTS OF FACTS

No challenges by PSC or NWE to certain Gruba Facts. The PSC and NWE Statements of Fact did not dispute any of Gruba facts, i.e., 1 through 7.

PSC's Statement of Fact I Heading is misleading. **T**he PSC "branded" the proceeding: "**I. This Court dismissed the Initial Complaint**." A less

[2] Opening Brief, pp. 12-13.
[3] Tab 237.
[4] Doc. Seq. 30.
[5] Tab 20.
[6] Opening Brief, pp. 7:33-10:2.

1 misleading heading would add: “**but allowed the Amended Complaint.”**

2 **PSC’s false Statement of Fact IV(a) claim.** PSC notes the ELDS-1 tariff
3 includes approximately eight separate charges including transmission, distribution,
4 and ownership, and admits it has approved “dozens of revisions” to
5 NorthWestern’s ELDS-1 tariff to “reflect typical fluctuations in several of the tariff
6 billing determinants.”[7]

7 Then the PSC falsely asserts “None are material to this appeal.” In making
8 this assertion, the PSC is blatantly ignoring unrebutted fact that it had failed to
9 apply §38.5.106, ARM, when increasing the ownership charge between 1997-2017
10 by 39% in Barsanti’s district alone.[8] So, the ownership charge increases are
11 relevant to Gruba Issue 1-4 consideration.

12 Gruba witnesses have noted from the start that the ownership charge is not
13 purely devoted to “capital cost recovery.”[9] The ownership charge includes taxes,
14 which vary but are only assessed by the state for 20 years after streetlights are
15 installed, so that and allowed variable ROI have also gone down.

16 **PSC Statement of Fact IV(b) includes untrue declarations.** The PSC
17 Answer Brief, pp. 8 & 9 claim that 2019 customers were being charged “for street
18 lighting service based on undepreciated capital expenditures from a 2009 rate case”

[7] PSC Answer Brief, p. 6, ftn. 1.
[8] Opening Br. p. 35:18-36:3
[9] See Opening Brief, pp. 11 & 12, Statement of Fact 3.

1 is not undisputed “fact.” Grubas have conclusively shown the so-called
2 “undepreciated capital expenditures” have become progressively overstated on a
3 system wide basis because depreciation is not based on revenue received for
4 depreciation purposes, but rather hypothetical, estimated service life. In addition,
5 NorthWestern cannot show depreciation on any lighting district basis and
6 Appellants proved completed depreciation in at least 119 Billings lighting districts
7 by 10/15/2008.[10]

8 Also, because it is not true, it cannot be “fact” that capital costs resulting
9 from investment in and replacement of street light infrastructure are not “included
10 in customer rates until the next rate case,” as the PSC’s Statement of Fact
11 contends.[11] NWE begins charging as soon as new lights are installed. See ¶9 of the
12 Terms section in the ELDS-1 tariff that says: “The initial term of the contract shall
13 commence as lighting units are energized for service.”

14 **NWE’s distribution plant example is irrelevant to streetlight**
15 **investment.** NWE references transformers. But that is distribution plant. So,
16 system-wide transformer use does not justify NWE's failure to depreciate
17 streetlights based on proper allocation of a portion of ownership revenue received

[10] Tab 164, Exhibit 40 Doty Amended Direct Testimony, pp. 23:6-12 & 21, Ex. 26.
[11] PSC Answer Br., p. 9

for the purpose of recouping streetlight class investment.[12] NWE's example is misleading because the ELDS-1 tariff contains transmission and distribution rates separate from the ownership charge. Nothing in the record indicates transformers are part of the streetlight customer class ratebase. Several customer classes (including the street light class) are charged distribution rates separate from other charges in rates for those classes. Likewise, the distribution charge is separate from the ownership charge and not a reason for ownership charge increases.

REPLY TO STANDARD OF REVIEW STATEMENTS

NWE misstates when a court may consider factual evidence. In its Standard of Review section NWE asserts:

> "'The court may not substitute its judgment for that of the agency' in weighing factual evidence." *Whitehall Wind, LLC v. Montana Public Service Com'n*, 2015 MT 119, ¶ 7, 379 Mont. 119, 347 P.3d 1273 (citing Mont. Code Ann. §2-4-**702**)). [Bolded for comparison]

After the part NWE cites, the complete quote from *Whitehall Wind* ¶ 7 includes:

> ¶ 7 … Section 2–4–**704(2)**, MCA. The court may reverse or modify an agency's decision if "substantial rights" of the appellant have been prejudiced because, among other factors, the agency's decision exceeds its statutory authority, is affected by legal error, or is clearly erroneous in light of [379 Mont. 122] the record. Sections 2–4–704(2)(a) (ii), (iv), and (v), MCA. [Bolded for comparison]

[12] NWE Answer Br., p. 3.

Thus, the *Whitehall* Court was quoting §2–4–704(2), MCA, not 2–4–702, MCA as NWE mistyped. And the *Whitehall* Court summary needs revision to comply with the statute which provides, "(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." That does not translate to: "The court may not substitute its judgment … 'in weighing factual evidence.'" That is, the court may rule on factual evidence, but if an agency weighed the evidence on questions of fact, then the court may not substitute its judgment for the agency's. **This subtle mischaracterization of §2–4–704(2) in *Whitehall* ¶ 7 should be overruled so it is not repeated here.**

Giving "great weight" to PSC's legal interpretation is erroneous. Please see Issue 1, subsection "Weighing not applicable…" below for discussion of why giving "great weight" to PSC's §69-3-109, MCA misinterpretation is not appropriate when the record contains the correct, unrebutted testimony of that statutes' author, Gruba witness Tom Towe.[13]

The Court is asked to embrace Grubas' Standard of Review section because it is more complete than Appellees'.

REPLY TO ARGUMENTS

Grubas' Issue 1: Did the District Court err when failing to enforce §69-3-109 and §69-3-321, MCA, by affirming the PSC decision allowing

[13] See Opening Brief, pp. 11 & 12, Statement of Fact 3.

NorthWestern Energy to recover revenues in excess of original streetlight costs in multiple lighting districts?

PSC Issue 1: Are select NorthWestern Energy ("NorthWestern") customers entitled to a refund because of overcharges resulting from NorthWestern's street lighting tariff?

NWE Issue 1: Did the District Court correctly affirm a decision of the Montana Public Service Commission ("Commission") finding that NorthWestern's street lighting rates did not violate Montana law and allow recovery in excess of original costs?

Appellees' Unsupported Legal Interpretation. The PSC's Order 7084aa dismissed a challenge to streetlight rates while ruling in ¶¶ 42, 43 & 67, without citing any case supporting its position, that §69-3-109, MCA, "does not prevent NorthWestern from recovering revenues in excess of original costs." The Court reviews that PSC interpretation to see if it is correct.

NorthWestern's Answer does not mention §69-3-109 except to indicate Opening Brief Issue 3 mistyped it. NWE does not challenge or mention Grubas' supporting caselaw either. Thus, the Court is urged to adopt Grubas' Opening Brief quote as the correct interpretation, viz.:[14]

> Montana law requires NorthWestern to use the original cost depreciated method of calculating the value of utility property placed into its utility rate base.[15] The Montana Supreme Court interpreted §69-3-109 *In Petition of Montana Power Co. for Increased Rates and Charges in Gas and Elec. Services*, 180 Mont. 385, 394 (Mont. 1979), 590 P.2d 1140, 1145,

[14] Opening Br. pp. 18-19.

[15] Tab 20, Complaint ¶ 24. For proof see footnote 106 of Tab 237, Complainants' Proposed Order.

upholding the elimination of $5.7 million from Montana Power's **previously approved rate base** when opining: "This statute is dispositive of this issue. Under it, the Commission is obligated to eliminate from rate base all utility costs in excess of original cost."[16]

The District Court, touted by Appellees, also misapprehended this mandate to eliminate "costs in excess of original costs."[17] The District Court would have done well to realize it does not matter how or when the rate base was corrupted. Section 69-3-109, MCA does specify, "the commission may **at any time** on its own initiative make a revaluation of the property."[18] Thus, if a rate base eventually contains a value in excess of original cost depreciated, the "water" must be written down rather than written up by an unlawfully sanctioned inflationary percentage in the carrying charge applied to the streetlight ratebase.

This Gruba interpretation of §69-3-109, MCA is based on substantial unrebutted evidence from the law's author, Tom Towe.[19]

It has been held in cases overturning the Texas White primary and gerrymandering that: "Constitutional rights would be of little value if they could be thus indirectly denied," or "manipulated out of existence." See *Smith v. Allwright*, 321 U.S. 649, 664, 64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110 (1944), and

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[16] Administrative Notice taken of this case and the quoted language at Tab 231, 7/19/18 Tr. 47-48.

[17] See Opening Brief pp. 17-23.

[18] Opening Br., p. 19:11-13.

[19] Opening Br., p. 11:11-12:3, unrebutted Gruba Statement of Fact 3; p.18:12-15; pp. 33:23-34:15.

Gomillion v. Lightfoot , 364 U.S. 339, 345, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

Likewise, hard fought consumer rights would be of little value if they could be indirectly denied or manipulated out of existence by NorthWestern who may have started by placing streetlights in its ratebase at original cost, but then not depreciated properly, so the ratebase became inflated over time.

Thus, a correct reading of §69-3-109 is necessary to curb NorthWestern's essentially unconfined power to manipulate its streetlight ratebase, and ownership and carrying charges to circumvent legal restraints.

NorthWestern's attempt to evade discharging ratepayers from obligations to reimburse the utility once reimbursement has been accomplished is void. Section §69-3-109 forbids the PSC and NorthWestern from cloaking in the rhetorical garb of "established rates are valid," a scheme to collect more than original cost.

It is inconceivable that guaranties embedded in §69-3-109, MCA may be "manipulated out of existence." Accordingly, all attempts to do that are void.

Weighing not applicable to statutory interpretation. As explained above, NorthWestern did not properly quote §2–4–704(2), MCA, or completely quote *Whitehall Wind* when setting forth the Standard of Review. While if correctly quoted, there is a limit to the Court's review on "weight of the evidence on questions of fact," it does not apply to "legal error," that is "clearly erroneous in light of the record."

Quoting the *Vote Solar v. Mont. Dep't of Pub. Serv. Reg.*, 2020 MT 213A, ¶ 37, 401 Mont. 85, 473 P.3d 963, Standard of Review, the PSC says:

> This Court also affords "great weight" to the Commission's interpretations of its **own regulations**, unless the interpretation "is plainly inconsistent with the spirit of the rule, considering a range of reasonableness permitted by the regulation's wording." [Bolding added]

However, the PSC's analysis fails when one considers that §69-3-109, MCA is a statute and not a regulation. And the statute is Tom Towe's, not the PSC's "own." So, the "great weight" afforded by the Court ought to be to Mr. Towe's uncontested, sworn, prefiled, cross examined testimony about what his clear law means.

PSC Order 7084aa ¶43 conceded: "The statute is intended to prevent the Commission from utilizing replacement cost valuation practices when evaluating rate base." But this PSC finding ignored the fact that Grubas proved the ownership charge was almost immediately padded with replacement cost (i.e., inflation) ratemaking. Mr. Doty's unrebutted testimony explained that Montana Power witness:[20]

> Mr. Maxwell lists a 2.5% Rate of Inflation. … This component of the carrying charge appears to be simply another attempt to get around original cost ratemaking established by Senator Towe's amendment to MCA §69-3-109. **Under the original cost method of ratemaking, a utility does not get to write up its rate base by applying a rate of inflation to it.** The old way of doing things in Montana was to write up the rate base by valuing it at

[20] Tab 164, Doty Amended Direct Testimony, pp. 9:17-10:15.

today's value. As Senator Towe explained that was called reproduction cost new ratemaking. It resulted in massive overcharges ….

As Mr. Towe's (footnote 8) improperly stricken testimony, in the record as an offer of proof, noted:

> ARM 38.5.106(1), promulgated in July of 1977 required analysis of the test year in electrical utility rate cases to include analysis of "the return, taxes, **depreciation**, and operating expenses, and an allocation of such costs to the services rendered." Please note that to avoid confusion, those items (i.e., return, **taxes**, depreciation, etc.) are intended to be treated separately and not mixed, contrary to what NorthWestern and Montana Power have done. [Bolding added]

NorthWestern is depreciating its rate base not related to revenue received to reimburse it, but at 2.89% a year[21] based on estimated time in service. However, it was offsetting that depreciation with a 2.5% rate of inflation.[22] That may explain some of why its alleged $12,733,634 net plant balance is that high. Also, as the Opening Brief indicated:

> Extending the life to 34 years or 40+ years and increasing the ownership charge by 39% creates revenue in excess of original cost …[plus allowed ROI].[23]

Tom Towe presented testimony on the fact that the street light rate base

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[21] Opening Brief, p. 29:4-5.

[22] Since Appellees have interjected PSC Docket D2018.02.012, into this case even though it is not in this record, the Court is asked to administratively notice the PSC public record in that case where NWE witness Normand said the carrying charge now adds an inflation rate of 1.5%, that Docket's Tr. 1250:23 – 1252:6.

[23] See Doc. Seq. 15, pp.14:22-15:14; Opening Br. p. 27:9-10, also p. 36:16-37:9.

became inflated even though it apparently started out as one based on original cost. NorthWestern's only rebuttal for that was to note that there is still $12 million in its rate base account. That is like saying our $12 million streetlight rate base account is not inflated because there is still $12 million in it. Thus, NorthWestern did not present credible evidence demonstrating that the account was not overstated.

The PSC's unjust impossibility view leaves discrimination unchecked.

PSC agrees that Appellants have been endeavoring to prove something (unreasonableness and unjust discrimination) that the PSC required via Order 7084f.[24] However, the PSC now inadvertently argues that proof was "impossible" from the outset. That is, after 10 years of Gruba witnesses demonstrating discrimination, the PSC quotes a 1988 treatise that as:

> … long as the prices charged by any given enterprise must exceed marginal costs, complete avoidance of discriminatory relationships among these prices is simply impossible.[25]

Therefore, "allegations that the ownership charge is unjustly discriminatory or preferential are not supported."[26]

Ironically, the PSC Answer Brief also inconsistently claimed:

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[24] PSC Answer Br., p. 4.
[25] PSC Answer Br., p. 15; PSC Order 7084aa, ftn. 4.
[26] PSC Answer Br., p. 15; PSC Order 7084aa, ¶46 .

> … [O]verall, the marginal costs to provide services across all customer classes were lower than the cost-based revenue requirement which the Commission had approved, each customer class cost responsibilities needed to be increased. *Id.* ¶ 51.

These determinations are inconsistent because the PSC thought its predecessor raised rates because marginal service costs were lower across all customer classes. But according to the PSC's quote, supposedly "avoidance of discriminatory relationships … is simply impossible" when "prices … must exceed marginal costs?" So, if rates were lower, that means the quoted "impossibility" scenario, which is dependent on higher rates, is not applicable.

As elaborated in Opening Brief, pp. 24:15-26:8, lighting districts always pay for their own streetlights. So, it is unjust discrimination to require folks in older districts where lights have already been paid for to subsidize the cost of newer suburban lighting.

Since both old and new lights are paid for by the folks where lights are installed, there is no need to have them paid for over and over by folks who have already paid for their lights. But that happens because the ownership charge is levied long after the cost of lights in a district has been recouped. So, not only is there is a charge in excess of original SILMD cost proven by Barsanti's math, but that charge unjustly discriminates against vintage customers who have defrayed the original cost of their lights.

No rational basis or compelling state interest exists for this discrimination

because professionally designed rates can eliminate the discrepancy without denying appropriate revenue to the monopoly or burdening other customers or customer classes. Once the streetlight customer class ratebase is written down to accurately reflect revenue received for reimbursement, the amount needed to cover streetlighting class costs will be sufficient.[27]

NorthWestern did not indicate where they book all the ownership charge revenue as it agreed to do; how much in the tax account; how much in the rate base account, or to ROR, and inflation.[28] By hiding that information NWE is able to mask the illegal part of its carrying charge that writes up the ROR and inflationary portion illegally and collects revenue from a lighting district in excess of original cost.

Thus, undisputed evidence demonstrated discrimination exists to a level that is illegal (and therefore unjust) because revenue from hundreds of SILMDs exceeds original cost.

PSC's Issue 1 argument jumps to unwarranted conclusion:

> The issue Complainants clearly raise is who pays to reimburse the utility for all [original] infrastructure costs incurred,…?[29] [Bracketed material added.]

[27] Tab 164, Doty Amended Direct Testimony, pp. 23:13-24:5.
[28] Tab 232, pp. 12:1-14:10, Complainants' post-PSC-hearing Brief.
[29] Doc. Seq. 15, Appellants' Brief to District Ct., p. 6:18-23; Opening. Br., p. 15:13-15.

1 When the original cost of streetlights and additions to them in a street
2 lighting district (SILMD) has been recovered by NorthWestern, residents in
3 that district have paid for their lights. Therefore, §69-3-109, MCA, requires
4 the (ownership charge) component of the ELDS-1 tariff rate that is meant to
5 recover original cost of lights in a district must be reduced for the lights in
6 that district. Because the ownership charge in a district is not reduced, it
7 becomes unjustly discriminatory, violating §69-3-321, MCA.[30]
8
9 The PSC's restatement of Gruba Issue 1 seeks to have this Court jump to an
10 unwarranted conclusion about refunds without considering all the evidence
11 indicating how the PSC has failed to follow §69-3-109, MCA.
12 Appellants' opening brief details that failure which is not restated here.[31]
13 **NWE & PSC misleading Seattle City Light assertions.** Rather than
14 confronting Grubas' Issue 4 head on, the PSC[32] and NWE[33] persisted in so-called
15 "fact" assertions regarding Seattle City Light contained in an *exparte* staff memo
16 that made it into Order 7084aa ¶38. Paragraph 38 was demonstrated to be
17 misleading by "leaving out convincing detail supporting Complainants'
18 allegations" as asserted in Opening Brief pp. 46:15-48:3.
19 In addition, in its "fact" statement, the PSC argued that because Gruba
20 witness Smalley indicated Seattle City Light has one street light customer class
21 that indicated NorthWestern's street lighting customer class was like Seattle's. And

[30] Opening. Br., p. 15:13-16:1.
[31] Opening. Br., pp. 16:2-17:4.
[32] PSC Answer Br. Statement of Fact ¶ IV(d), pp. 11 & 12.
[33] NWE Answer Br. pp. 7 & 17.

further that:

> The record did not contain any evidence of utilities which establish a separate customer classification for each utility lighting district, nor analysis of the practicality or costs to do so.

This assertion falsely assumes that separate customer classes for each lighting district are necessary. Existing lighting categories are sufficient as explained in Opening Brief, p. 30:4-31:14. There Grubas' witnesses demonstrate why further study is not needed because tracking original cost by lighting district is easily calculated and therefore is not onerous. So, it is false for NorthWestern,[34] "the PSC and its staff to continually assert that the Complainants' remedy would require hundreds of additional customer classes!"[35]

The historical background of one customer class outlined by the PSC in Statement of Fact ¶VI(c)[36] is also immaterial because there will still be one streetlight customer class if Grubas' remedy is adopted. All that must be ordered is to require NWE to reveal the original cost of all new lights. Original cost by lighting district has already been estimated to be within $200 per existing streetlight calculated when the streetlights in a lighting district were placed in one of the existing LP00 categories in the existing ELDS-1 tariff.[37] Since under proper

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[34] NWE Answer Br. p. 16.
[35] Opening Brief, p. 30:12-13.
[36] PSC Answer Br., p. 11.
[37] PSC Answer Br., p. 7, Statement of Fact ¶VI(a).

1 regulation, each needed input is available for each lighting district, all that remains

2 to be calculated is to use the same formula Gruba witnesses Barsanti and Doty

3 used. That is the Excel spreadsheet NPER formula(ROR%/12, -ownership

4 charge(portion to recoup capital plus cover ROR), Original cost,0,0).[38]

5 It is not onerous to plug in the portion of the ownership charge dedicated to

6 recover street light investment and the allowed rate of return and voila, the number

7 of years the ownership charge needs to be levied appears indicating when the

8 monopoly will be made whole for its investment in that SILMD. No need to create

9 any new customer classes or new LP00 schedules in the existing ELDS-1 street

10 light schedule either.

11 Appellees ignore Grubas' compelling analysis proving Seattle's new LED

12 residential streetlights, that will be paid for in 15 years:

13 … are much cheaper ($11.81/month) than NWE's 1984 HPS
14 ($23.09/month) in Barsanti's district. That is circumstantial evidence
15 proving ownership charge revenue meant to defray original cost is being
16 diverted away from the depreciation reserve to an account NWE will not
17 reveal. It inflates the monopoly's bottom line illegally.[39]
18
19 Grubas' analysis[40] also proves Grubas' Issue 5 claim—that the PSC was

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[38] Tab 164, Amended Doty Testimony, pp. 17-23.
[39] Opening Br., p. 29:4-12.
[40] See Opening Br., p. 47:15-19, 47:25-27:

> So, after installation of 71,659 new residential and arterial LEDs Seattle … lighting costs are far lower than [what NWE] … charges for the almost as many (75,262) outdated streetlights … in … [its]

remiss in not considering in 2010, Complainants' request to remedy, pursuant to §69-3-321(1)(c), NorthWestern's inadequate high pressure sodium streetlight service.

> **Grubas' Issue 2:** Was the District Court's upholding of PSC Order 7084aa clearly erroneous because the PSC engaged in unlawful procedure when it failed to apply §38.5.106, ARM?
>
> **PSC Issue 3:** Did the Commission correctly conclude that Mont. Admin. R. 38.5.106 was not relevant to the Amended Complaint?
>
> **NWE Issue 2:** Did the District Court err when it affirmed the Commission decision that appropriately did not consider certain claims and allegations?

PSC's history of failing to apply §38.5.106, ARM. to streetlights.

Appellants' opening brief cites[41] at least 25 times over 20 years when NorthWestern's street lighting rate ownership charges have been increased by a total of 39% in Barsantis' district between 1997 and 2017 without an increase in original cost or taxes on lights in the district or an addition to those lights. Nevertheless, those increases were approved by the PSC without applying its own rule §38.5.106, ARM. Some of those increases occurred when this case was pending, even during the 2017-2018 periods used as an example in NWE's Answer

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> system. [Bracketed material added for clarity.] … Paying twice as much for energy-wasting streetlights in Billings than for efficient LEDs in Seattle is not "service" as Staff and NorthWestern call it. It is disservice.

[41] Opening Br., pp. 34-37.

1 discussed below.

2 The PSC and NorthWestern could not rebut Appellants' evidence because
3 NorthWestern did not provide original cost figures by SILMD and did not
4 depreciate based on the portion of ownership charge revenue received for
5 depreciation purposes, but rather depreciated based on changing estimated
6 streetlight life expectancy.

7 It is axiomatic that as life expectancy of streetlights increases the amount
8 needed each year to cover original cost should decrease especially since allowed
9 rate of return also decreased.[42] That is what Barsanti was attempting to show with
10 his mortgage example, which was improperly stricken but preserved as an offer of
11 proof.[43]

12 Since this axiomatic fact concerning the lesser amounts per year needed to
13 depreciate or amortize an asset as the life of the asset increases are not rebuttable,
14 the PSC was left with contending its rule was not meant to be applied in a
15 complaint docket like this one, but rather in the alleged words of the District Court
16 Order at 9 "**only** at the time of [a utility] filing" seeking rate approval [Bracket and
17 bolded material added for clarity.]

18 Thus, the PSC's Answer Brief implied the word "only" was in its rule.

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[42] See Opening Br. p. 20:8-17, pp. 21:20-22-23:3 & ftn. 44, & p. 27:4-10.
[43] Tab 166, ftn. pp. 28 & 29, Barsanti Amended Direct Testimony.

However, the Court's ruling had the word "only" outside of the quotation marks. Thus, despite the PSC misinterpretation, its rule does not specifically state "**only** at the time of [a utility] filing." As indicated in Appellants' Opening Brief, the Court opined:

> By seeking to apply this rule to this contested case, Grubas ignore the language of the regulation, which expressly applies only "at the time of the filing." This regulation does not require an after-the-fact audit once the rate case has concluded. This regulation is not relevant to Grubas' claims and the PSC correctly ignored it in its final order.[44]

Appellants did not ignore the "at the time of filing" wording. It is completely and correctly quoted in context by appellants.[45] While §38.5.106 ARM "… does not require an after-the-fact audit once the rate case has concluded," it does not preclude a review to show that proper procedure was not followed at the time required either.

Section 38.5.106, ARM, does not include the word "only" when requiring:

> … [N]o adjustments shall be permitted unless based on changes in facilities, operations, or costs which are known with certainty and measurable with reasonable accuracy at the time of the filing.

NWE embellishment does not prove §38.5.106, ARM, followed. Despite the fact that the word "only" is not in the rule, NorthWestern joins in the PSC claim that §38.5.106, ARM "is applicable **only** when setting rates," [bolding added] and therefore does not apply to Grubas' complaint proceedings.[46] NWE attempts to embellish the PSC argument by adding that §38.5.106, ARM applies

[44] Doc. Seq. 41, p. 9:18-22.
[45] Doc. Seq. 15, p. 17:5-7.
[46] NWE Answer Br. pp. 20-22, Issue 2(a) (II) argument.

when:

> … utility rates are based on a historical 12-month period (e.g., January 1, 2017 through December 31, 2017) adjusted for known and measurable changes in costs and expenses that occurred during the subsequent 12 months ….

Please note that NorthWestern's Answer Brief did not prove that the rule was followed when streetlight rates were set. NWE did not even address that proof. Also, in PSC Docket D2018.2.12, NWE was not required to abide by §38.5.106, ARM either. Order 7604u ¶ 277 found:

> Further, **no party [including NorthWestern] provided substantial evidence supporting a rate base adjustment for a known and measurable change pursuant to Mont. Admin. R. 38.5.106** for the LED replacement project. The Commission concludes that any discussion on LED lighting is outside the scope of this docket. [Bracketed material and bolding added for clarity.]

It is irrelevant that the LED discussion was improperly excluded from Docket D2018.2.12 discussion. NWE is still required to comply with §38.5.106, ARM when raising streetlight rates in that docket.

The Court can take administrative notice of its own record that Barsantis' challenge to the PSC's rejected discovery requests and failure to correctly apply §38.5.106, ARM in D2018.2.12 was dismissed without reaching those 3c, 3a & 3b issues in *Barsanti v. Montana Pub. Serv. Comm'n*, 2021 MT 54N, 481 P.3d 232. [47]

[47] Order 7604u ¶¶ 265–278 is mentioned in the PSC's Answer Brief, p. 23. That case was not part of this record, and Barsantis' appeal of PSC Order 7604u in

Collateral attack available to remedy failure to apply §38.5.106, ARM.

The fact that proper procedure was not followed in a rate proceeding makes that procedure subject to collateral attack at any time and place. *Barnes v. Am. Fertilizer Co*., 144 Va. 692, 705, 130 S.E. 902, 905 (1925)

Barnes was briefed in Grubas' Opening Brief, p. 40:23-30, Issue 3 concerning the PSC's ultravires acts.[48] The PSC and NWE did not mention *Barnes* in their Answers.

It makes no sense to require data supporting street light rates set in a rate proceeding to be "known with certainty" and "measurable with reasonable accuracy," and to prevent utility data in a complaint proceeding from being held to that standard. If NWE had met that standard in prior rate proceedings, it could easily demonstrate it to meet the complainants' concerns by providing original cost numbers and clarifying how it books revenue to defray cost. In this complaint proceeding, Appellants proved NorthWestern did not provide accurate data because it could not or would not.

Grubas' Issue 3: Did the District Court err when refusing to void from the beginning prior *ultravires* acts exceeding PSC and NWE authority when the PSC approved an ELDS-1 tariff allowing NWE to recover more

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it was dismissed (2021 MT 54N) for failure to seek reconsideration after the final order was issued. Nevertheless, while the case is non-citable, since the PSC mentions it here, fairness permits Grubas to also seek judicial notice of relevant portions (i.e., ¶ 277) of that PSC Order.

[48] Opening Br. p. 40.

than the original cost of streetlights allowed by §69-3-901, MCA, from ratepayers in various Street Improvement Lighting & Maintenance Districts?

PSC non-specified Issue: The PSC did not address this Gruba issue except as part of its Issue 1 claims.

NWE Issue 2 (also II): Did the District Court err when it affirmed the Commission decision that appropriately did not consider certain claims and allegations?

PSC has power to nullify NWE contracts imposed on cities.

Grubas appreciate NorthWestern's pointing out[49] that Grubas' references to §69-3-901, MCA should have been typed as §69-3-109 on Opening Brief pages 38 & 39.

NorthWestern does not rebut the three cases cited in Grubas' Opening Brief, Issue 3.[50]

NWE claims that §1-3-230, MCA, ("Time does not confirm a void act.") is not applicable here because allegedly NWE was not allowed to collect streetlight revenue in excess original cost, so no void act happened. If that fiction were true Seattle City Lights residential street light customers with newer, LEDs that will be fully depreciated in 15 years, would not be paying half of what Billings taxpayers were charged for 34-year-old energy hogs that would be fully depreciated if it were not for NorthWestern's machinations. The District Court also ignored the Seattle

[49] NWE Answer Br., ftn. 3.

[50] Compare cases in Opening Br. pp. 40-41 with NWE Answer Br. pp. ii & iii.

data which contradicts its erroneous ruling that "there is no overcharge."

NorthWestern also relies on the dicta in *City of Baker v. Mont. Petroleum Co.*, 99 Mont. 465, 44 P.2d 735, 738 (1935) in contending its rates may not be collaterally attacked once they are subject to direct, unappealed review of unsworn testimony before the Commission. Please review multiple reasons for distinguishing *Baker* in Grubas' post-PSC-hearing Reply Brief, the most important being:

> …*Baker* does not apply here is because *Baker* was not a case where the city and the Commission were acting outside of the bounds of power granted them. Both entities in *Baker* had authority. In this case, the prior Commission acted outside the bounds of its authority. Therefore its acts were void from the beginning, could be collaterally attacked at any time, and are subject to nullification….[51]

NorthWestern and the PSC cannot justify a longstanding error by asserting the error must be permissible because it has been around for a long time and has been approved over that period by Commissions that made the error. Those unlawful errors are void from the beginning regardless of who approved them if street lighting contracts overseen by the PSC or imposed on cities by NWE were: *"(1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; …."* §28-2-701, MCA.[52]

NWE's response to this statute is:

[51] Tab 235, pp. 8:4-9:15, Complainants' post-PSC-hearing Reply Brief.
[52] Tab 232, pp. 46:22-48:11, Grubas' Post PSC-hearing Brief.

> the Commission is without authority to decide contractual issues, as that authority is reserved for the judiciary. *See* §69-3-103(1), MCA; *see also, NorthWestern Corp.,* 2016 MT [sic.] at ¶ 32…[53]

Please read further in the *NorthWestern* case. Contrary to NorthWestern's assertion, it held:

> ¶ 37 …Commission rules, which specifically require risk analysis and mitigation, including an examination of the relevant contract terms. The Commission was correct to apply these standards." *Nw. Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2016 MT 239, 385 Mont. 33, 380 P.3d 787 (Mont. 2016)

In May of 2013, the PSC's control over contracts was briefed by the parties in this case.[54] The statute NWE cites above is not applicable here. Section §69-3-102, MCA, does apply, providing: "The commission is hereby invested with full power of supervision, regulation, and control of such public utilities…." along with *Home Building & Loan Assn. v. Blaisdell*, 189 Minn. 422, 425, 249 N.W. 334, Aff'd. 290 U.S. 398, 435, 54 S.Ct. 231, 78 L.Ed. 255 (1933) and five other cases on police power discussed in that brief.

That brief also observed:

> Montana law and NorthWestern contracts both provide for Commission approval of contracts. Paragraph 27 of the Complaint pled: "All of the contracts for street lighting between Billings and Respondent make the charges under each contract subject to PSC approved street lighting tariffs." NorthWestern's answer to that statement was:

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[53] NWE Answer Br. p. 22.

[54] Tab 36, "Complainants' Initial Brief -- Requested by PSC," question 3f, pp. 27-33.

> NorthWestern is without sufficient knowledge to admit or deny that all of its contracts with the City of Billings have the alleged provision, but does admit that some of its contracts with the City of Billings contain such a provision."
>
> A computer search of the PDF file of street lighting contracts indicates they all have a clause subjecting the contracts to PSC approval.

Thus, the PSC's failure to make a requested finding on paragraph 27 is material error.

The Commission had and has no authority to approve a procedure, contract, or artifice to circumvent the law.[55]

PSC misreads Mtn. Water case. The PSC does not rebut either statute supporting Grubas' Issue 3 (i.e., §28-2-701, or §1-3-230). However, the PSC continues to misapply *Mtn. Water Co. v. Mont. Dep't of Pub. Serv. Reg.*, 254 Mont. 76, 80, 835 P.2d 4 (1992).[56] That was clear legal error as briefed by appellants:

> Administrative agencies never have discretion to commit legal error. Mountain water lost out because it did not ask for a rate increase in a timely manner. … *Mountain Water,* 835 P.2d 4 at 6. …
>
> Further, this is a claim by consumers seeking a refund of overcharges, not a claim by a utility for a retroactive rate increase as was the case in *Mtn. Water*. Even the *Mtn. Water* court understood utilities may be allowed to recover revenue lost if they apply in a timely manner …."[57]

Appellants' application for a rate decrease when this case started was timely.

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[55] Tab 213, Exhibit 47 Doty Reply Testimony p. 13:17 – p. 14:8.
[56] Order 7984aa ¶ 39; PSC Answer Br. p. 12; Tab 241, ¶ 39.
[57] Tab 232, pp. 46-48.

Grubas proved:[58]

> … the PSC lacked authority to approve an ELDS-1 tariff allowing NWE to recover from consumers in many lighting districts, more than the original cost of streetlights allowed by §69-3-109, MCA.[59]
>
> Further, Gruba's unrebutted testimony demonstrated a:
>
> refund should go back to at least the 2010 date when the case was filed. The record[60] provides credible, unrebutted figures to accomplish a refund ($78,528 for SILMDs 161 & 162; $55,571 for SILMD 228; and $5,856,049 for many other SILMDs where NorthWestern owns lights).
>
> Please order refunds of those amounts.

> **Grubas' Issue 4:** Did the District Court err by refusing to hold the PSC accountable for considering an *exparte* memo from the hearing examiner and other staff without allowing response from either party?

Claims that staff memo conveyed false information remain unrebutted.

Neither appellee rebutted the fact that the 12/12/18 staff memo[61] had misstated Appellants' understanding of the ownership charge resulting in staff's mistaken "sole purpose" concept making it into Order 7084aa ¶ 58.[62]

Neither Appellee Answer Brief rebutted the convincing evidence demonstrating Seattle's newer streetlight cost half of older Billings streetlights or other errors caused by staff's *exparte* claims concerning Seattle as detailed in the

[58] Opening Br., p. 39:2-10.

[59] Tab 232, Complainants' Post-Hearing Brief to the PSC, Tab 235, Complainants' Post-Hearing Reply Brief to the PSC & Doc. Seq. 15, pp. 20-24).

[60] Tab 232, Complainants' Post-Hearing Brief, relief ¶ J and Tab 237, Proposed Order ¶¶ 45, 80, 99 & 102.

[61] Tab 239.

[62] Opening Br. p. 44:3-45:19.

1 "NWE & PSC misleading Seattle City Light assertions" section above.

2 Also, Grubas' ¶ 5 Response to Staff's 12/12/18 Memo remains

3 unexplained.[63] Why was an overstated 27.4% of the ownership charge used to

4 defray property tax expense after 2004, when that would have totaled

5 approximately $65,479 in property taxes on an asset [SILMD # 228 streetlights]

6 originally costing only $46,371? That asset was supposed to be taxed at a rate of

7 12% according to information supplied by Mr. Schwartzenberger during the

8 hearing.[64]

9 Neither appellee contested the fact[65] that Hearing Examiner Rogala refused

10 to distribute to the Commission, Complainant's response to the 1/12/18 memo he

11 helped draft, and instructed Commissioners to avoid reading it if they happened to

12 see it. Yet, Examiner Rogala contends in the PSC's Answer Brief that Grubas due

13 process was not denied because Grubas moved for reconsideration. But the

14 Commission denied reconsideration after Rogala's additional memo urged denial.[66]

15 Even if staff's memo is not considered to be *exparte* (and Grubas' Opening

16 Brief explains why it is),[67] [68] it contained at least three unrebutted material errors

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[63] Opening Br. p. 45:20-46:14.

[64] Tab 231, 7/20/18 Tr. 59:1 – 3; See also § 15-6-141, MCA.

[65] Opening Br. p. 42:8-10.

[66] Tab 243, Staff's 3/7/2019 Memo urging denial of Complainants' Motion to Reconsider.

[67] Tr. 38:6-41:20.

1 that denied Grubas due process.

2 **Grubas' Issue 5:** Did the District Court deny Appellants due process
3 when upholding PSC Orders 7084e and 7084f refusing to consider
4 allegations that NWE would not allow consumers to use its poles to house
5 energy efficient parking lot and street lights?
6
7 **Policy doesn't allow monopolies to stop competitors' use of its poles**.

8 The PSC Answer Brief[69] did nothing to rebut the unrefuted facts in evidence as
9 offers of proof that NorthWestern denied the Bozeman Methodist Church and
10 former state legislator Bruce Simon the right to use NorthWestern poles they had
11 paid for to house LED parking lot and street lights that were more efficient than
12 high pressure sodium lights used by NorthWestern.

13 Appellees did not rebut the proof that use of LED lights on those poles or in
14 its SILMDs would have reduced the energy component of their respective street
15 lighting tax assessment for the ownership charge by 64%. That savings has been
16 verified by sworn testimony in subsequent PSC Docket D2018.02.012, where
17 Appellants were not allowed to address LEDs either.

18 The PSC cites no caselaw where its alleged "prefatory or remedial" pleading
19 by Grubas justifies the PSC's ignoring a clear §69-3-321(1)(c) request for relief for
20 better, cheaper service properly stated and noted in the Amended Complaint as
21 required by ARM §38.2.1202(1)(a).

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[68] Opening Br. pp. 42:11-44:2; Tr. 40:12-41:20.
[69] PSC Answer Br., pp. 32-35.

Except to demonstrate bias in labeling Barsantis' allegation of insufficient service "vague," the PSC's answer brief does nothing to support that characterization. Appellants' opening brief lays out the exact amended pleading objecting to NorthWestern's inadequate service and monopolistic denial of its pole use to improve service and asks the Court to opine on pleading sufficiency.[70]

Please read the *Federal Trade Commission v. Ticor Title Insurance Company*, 112 S.Ct. 2169, 504 U.S. 621, 633, 119 L.Ed.2d 410 (1992) case cited by the PSC. The active supervision test on page 633 that PSC relies on[71] is not applicable here because there is no "clearly articulated and affirmatively expressed" state policy permitting monopolies to prevent competitors from using its poles.

> … while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, … is the precondition for immunity from federal law.

Since the remedy of allowing pole use was immediate, it was also ripe. See Amended Complaint remedy ¶¶ H & K quoted at Opening Br. 51:14-31. Thus, all three criteria allegedly used by the PSC to narrow the Amended Complaint were either misapplied or not applicable. Hence, the Commission decision to ignore the

[70] Opening Br. pp. 50:10-51:31.
[71] PSC Answer Br. pp. 33-35.

1 Montana Constitution Art. IX § 1 , and Art. II, § 3 rights, and US Supreme Court
2 anti-trust law directly on point "exceeded the bounds of reason," and lacked the
3 "conscientious judgment" which the PSC believes affords it a *Jarvenpaa v. Glacier*
4 *Elec. Coop.,* 1998 MT 306, ¶ 13, 292 Mont. 118, 970 P.2d 84 safe-harbor.
5 Thus, the PSC denied Rev. Soderberg and Representative Simon due process
6 and abused its discretion by striking sworn testimony establishing the factual basis
7 for what was pled.

8 By: /s/ Russell L. Doty Dated: May 24, 2021
9 Attorney for Appellants
10
11 CERTIFICATE OF COMPLIANCE

12 I hereby certify that the foregoing brief is proportionally spaced typeface of
13 14 points and does not exceed 6,541 words as allowed by Supreme Court Order of
14 May 12, 2021. /s/ Russell L. Doty
15
16 CERTIFICATE OF SERVICE

17 I, Russell L. Doty, certify that on May 24, 2021, a true and accurate copy of
18 the foregoing Appellants Reply Brief was served upon the parties listed below by
19 e-filing it with:

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