

*Montana PSC – One Week Calendar of Scheduled Events
(This is not an official schedule of PSC activities)*

January 31- February 4, 2022

MONDAY 31	
TUESDAY 1	<p>9:00 AM – WEEKLY SCHEDULING MEETING (Commission Conference Room) (No web/audio feed)</p> <p>9:30 AM – BUSINESS MEETING (Bollinger Conference Room)</p> <p>Call To Order</p> <p>Pledge of Allegiance</p> <p>Public Comment – Please follow the directions under ‘Public Involvement’ on the Agenda</p> <p>Announcement of Changes to the Agenda</p> <p>Action Items:</p> <ol style="list-style-type: none"> 1. Approval of the Commission Minutes for the week of January 24, 2022 2. Approval of Out of State Travel – Brooke Umsted <p>Work Sessions:</p> <ol style="list-style-type: none"> 1. 2021.05.073 – Town of Kevin v. North Central Montana Regional Water Authority - To consider North Central Montana Regional Water Authority’s motion to dismiss 2. 2021.11.132 – NorthWestern Energy – Application for Approval of Energy Storage Agreement – To decide whether NorthWestern’s Application is adequate 3. Commission Initiated – Litigation Status Update – To provide an update on currently pending litigation and discuss litigation strategy. Closed to the public. (No web/audio feed) <p><i>Note: the presiding officer of any meeting may close the meeting during the time discussion relates to a matter of litigation and/or litigation strategy and the presiding officer determines the need to protect agency litigation decision making and discussion exceeds the of public disclosure. The discussion in this closed session will involve discussions and decision-making related to ongoing litigation in which the agency is involved as a party. Accordingly, as the presiding officer of this meeting, I am closing this meeting to the public.</i></p> <p style="text-align: right;"><i>- Chairman Brown</i></p> <p>Other Meetings:</p> <ol style="list-style-type: none"> 1. 1:30 - 3:30 PM - 2020.12.121 – L&L Oral Argument (Bollinger Conference Room)
WEDNESDAY 2	
THURSDAY 3	
FRIDAY 4	

***Next Commission Business Meeting Tuesday, February 8, 2022**

**MONTANA PUBLIC SERVICE COMMISSION
AGENDA NO. 2022-02-01**

Date Published: January 28, 2022
For Week Commencing: January 31, 2022

Place of Meetings: All meetings are held at the Commission's office, 1701 Prospect Avenue, Helena, Montana, unless otherwise noted.

Commission Meetings:

Commission Scheduling Meeting: Tuesday, February 1, 2022, 9:00 a.m.
Commission Business Meeting: Tuesday, February 1, 2022, 9:30 a.m.

Action Items

All items identified below are for action at the Commission's Business Meeting this week:

1. Approval of Commission Minutes (Patricia)

Approval of the Commission Minutes for the week of January 24, 2022

2. Out-of-State Travel (Will)

Staff requests approval for Brooke Umsted to travel to San Diego, CA May 8 - 13, 2022, to attend the National Association of Regulatory Utility Commissioners' ("NARUC") Western Rate School.

Work Sessions

All items identified below are for Commission discussion or action at the Commission's Business Meeting this week:

1. 2021.05.073 – Town of Kevin v. North Central Montana Regional Water Authority - To consider North Central Montana Regional Water Authority's motion to dismiss
2. 2021.11.132 – NorthWestern Energy – Application for Approval of Energy Storage Agreement – To decide whether NorthWestern's Application is adequate
3. Commission Initiated – Litigation Status Update – To provide an update on currently pending litigation and discuss litigation strategy. Closed to the public. (No web/audio feed)

Note: the presiding officer of any meeting may close the meeting during the time discussion relates to a matter of litigation and/or litigation strategy and the presiding officer determines the need to protect agency litigation decision making and discussion exceeds the of public disclosure. The discussion in this closed session will involve discussions and decision-making related to ongoing litigation in which

the agency is involved as a party. Accordingly, as the presiding officer of this meeting, I am closing this meeting to the public.

–Chairman Brown

Other Meetings

1. 02/01/2022 - 1:30 - 3:30 PM - 2020.12.121 – L&L Oral Argument (Bollinger Conference Room)

Notice Items: All items identified below are noticed for public involvement purposes. Unless otherwise stated in the text of the Notice, the items will be action items on a subsequent Agenda. Public Comments on this Agenda's items need to be submitted within 5 calendar days following publication of this Agenda. Public comments on a noticed matter must be submitted within the required deadline provided in the Notice. Please refer to the "Public Involvement" item in this Agenda for options and assistance.

None

Transportation Notice Items: Motor carriers with proper standing may protest Applications. Protests related to an Application for Class A, B, and E passenger authority is limited to a protest of the motor carrier's ability to meet the requirements of Mont. Code Ann. §§ 69-12-323(5) and 69-12-415. Protests must include the proper fee, as required by Mont. Admin. R. 38.3.402(c), and conform to the requirements at Mont. Admin. R. 38.3.405 or 38.3.406 as applicable. A protest form is available on the Commission's website <http://psc.mt.gov/For-Regulated-Utilities/Compliance-Materials#undefined>. If no written protests are received by the deadline, the Commission may issue a final decision on the Application (including a decision by delegation of authority to Commission staff pursuant to established internal operating procedures) without a public hearing, pursuant to Mont. Code Ann. § 69-12-321.

None

Protective Orders – Notice Items: The Commission has received the following requests for Protective Order(s) pursuant to Mont. Admin. R. 38.2.5007. Comments on the requests may be submitted at any time prior to ruling. Copies of these requests may be viewed on the Commission's website <http://psc.mt.gov>.

None

Protective Orders – Information Items: The Commission has issued the following Protective Order(s). These Order(s) may be challenged pursuant to Mont. Admin. R.

38.2.5008. Copies of the Order(s) may be viewed on the Commission's website <http://psc.mt.gov>.

None

Information Items: All items identified below are for *information only*.
Information Items:

New Regulatory Filings Received in Past Week:

None

New Transportation Filings Received in Past Week:

None

General Information: This is the Commission's Agenda for the week designated above. The Agenda is posted a week in advance on the public information bulletin board at the Commission's office, is emailed to all persons who have requested notice by email, and is posted on the Commission's website <http://psc.mt.gov>.

Public Involvement: The Commission invites the public's involvement in its proceedings. Options are:

- (1) provide written comments at the Commission's website <http://psc.mt.gov>, select "Documents & Proceedings" Tab; select "Comment on a Proceeding", select "Continue as Guest", complete form, select "Submit";
- (2) get on the Commission's "Watch List" for a Docket at the Commission's website <http://psc.mt.gov>, select "EDDI" icon on the main page, create an account for "ePass", under "Watch List" Tab enter the Docket number—the Commission's case you are interested in following;
- (3) watch the meeting's "Live Webcast" from your computer at <http://psc.mt.gov/livestream>;
- (4) attend a Commission meeting in person and provide comments;
- (5) attend a Commission meeting via Zoom to provide public comment:
 - a. Please call the Commission's toll-free number at 1-800-646-6150 by 4:30 p.m. on the day before the scheduled Business Meeting.
 - b. You will need to provide your name; the docket number or a description of the docket on which you wish to provide comment; your phone number; and your email address.

- c. You will be given an identifier, such as “Commenter 1, 2, etc.” This identifier will be how you are recognized to provide public comment during the business meeting.
- d. Once you have provided public comment at the business meeting, you will no longer be able to provide public comment. You may stay in the meeting, or you may leave the meeting and continue to listen in on the Commission’s live stream.
- e. You may also provide written comments as outlined in paragraph (1) under “Public Involvement.” These comments are not made publicly available but are provided to the docket work team and Commissioners.

(6) sign up on the Commission’s “Email List” to receive Notices by email for the following categories: Rules, Motor Carrier, Energy West Applications, MCC & PSC Taxes, MDU Applications, NorthWestern Energy Applications, PSC Orders, Telecommunications Applications, PSC Agendas, and PSC Hearings.

(7) mail or deliver written comments to the Commission’s office, 1701 Prospect Ave., P.O. Box 202601, Helena, MT 59620-2601;

(8) contact your District’s Commissioner; and

(9) contact the Commission’s Consumer Assistance staff at 1-800-646-6150 or email pschelp@mt.gov. They are happy to assist you!

Live Webcast: Visit <http://psc.mt.gov/livestream> to watch live stream of Commission meetings and hearings.

Inquiries: For general inquiries concerning this Agenda, contact Patricia Trooien at (406) 444-6199 or the Commission’s Consumer Assistance Staff at 1-800-646-6150.

Accommodations for Individuals: Individuals needing accommodations to attend or participate at a Commission meeting or hearing may contact the Commission’s Consumer Assistance Staff at 1-800-646-6150 or by email pschelp@mt.gov prior to the meeting or hearing. The Commission will make every effort to provide assistance.

****Qualifies for Staff Action. Upon receipt of a written request by a Commissioner or an interested person submitted within five (5) business days of the date published on this Agenda, the Commission will review this item.***

Staff requests approval for Brooke Umsted to travel to San Diego, CA May 8 - 13, 2022, to attend the National Association of Regulatory Utility Commissioners' ("NARUC") Western Rate School.

PSC Work Session Request

Date of request: January 10, 2022

(to be included on the agenda for the next following business meeting request must be made by 5:00 p.m. Monday)

Week work session to be held: February 01, 2022

Request is:

- routine -- on agenda, normal day and time of work sessions
- special -- on agenda, special day or time:
- out-of-cycle -- not on agenda, day and time:
- other meeting, day, time and location:

Called by: Lucas Hamilton

Participants: Lucas Hamilton, Grant Fink

Docket Number: 2021.05.073

Applicant or Petitioner: Town of Kevin v. North Central Montana Regional Water Authority

Case or Subject: Complaint

Purpose: To consider North Central Montana Regional Water Authority's motion to dismiss.

Staff Recommended, Suggested or Alternative Motions:

Additional Information:

Reference materials: Motions and briefing, staff memo
(memos and materials to be distributed by last work day of week request is made, if possible)

Estimated time required: 15 minutes

January 24, 2022

MEMORANDUM

TO: The Public Service Commission
FROM: Lucas Hamilton, Grant Fink
SUBJECT: Motion to Dismiss and Additional Briefing in Docket 2021.05.073

PURPOSE

This memorandum provides a partial analysis of arguments raised in the Motion to Dismiss (“Motion”) filed by the Northern Montana Regional Water Authority (“NCMRWA”) regarding the Town of Kevin’s (“Kevin”) Complaint. Upon review of the Motion and briefing submitted by the parties, Commission staff recommends ordering the parties to file briefs on a potentially dispositive question of law that is not directly addressed by the current briefing.

ANALYSIS

1. Standard of Review

When considering a motion to dismiss, the “only relevant document . . . is the complaint and any documents it incorporates by reference.”¹ When considering a motion to dismiss, the Commission should treat all well-pleaded allegations in the complaint as admitted, and construe the complaint in the light most favorable to the complainant.² It is unnecessary, however, to take as true legal conclusions or allegations that have no factual basis.³

Although NCMRWA has provided a substantial amount of explanation of its practices and included with its motion a supporting affidavit, any additional facts provided by NCMRWA should not factor into the Commission’s consideration of the motion to dismiss. Applying the relevant standard of review, the Commission should look only to the facts alleged in Kevin’s Complaint and the documents incorporated in the Complaint as attachments.

2. Authority to Dismiss without a Hearing

Kevin claims Mont. Code Ann. § 69-3-325 does not allow the Commission to dismiss its complaint without a hearing. That statute discusses the necessity of notice before a hearing, but it does not expressly require the Commission to hold a hearing. Instead, Mont. Code Ann. § 69-3-325 must be read in the context of Title 69, Chapter 3, Part 3, and particularly Mont. Code Ann. § 69-3-321. That statute provides in pertinent part:

The commission shall proceed, with or without notice, to make such investigation **as it may deem necessary** upon a complaint made against any public utility No order affecting such rates, tolls, charges, schedules, regulations, measurements, practices, or acts complained of shall be entered without a formal hearing⁴

¹ *Williamson v. Mont. PSC*, 2012 MT 32, ¶ 33, 364 Mont. 128, 272 P.3d 71.

² *Id.*

³ *Id.*

⁴ Mont. Code Ann. § 69-3-321 (emphasis added).

While the Commission must hold a hearing before issuing an order to change a utility’s rates, the Commission is not required to continue a complaint-based proceeding that it deems unnecessary. There is ample precedent for the Commission to dismiss a complaint.⁵

Moreover, the power to dismiss complaints is essential to the operation of the Commission. The Commission cannot gain subject matter jurisdiction outside of its statutes.⁶ “Subject-matter jurisdiction can never be forfeited or waived . . . [and] cannot be conferred by the consent of a party.”⁷ Reasonable doubts about “the grant of a particular power will be resolved against the existence of the power.”⁸ It would be incompatible with well-established limits on the Commission’s jurisdiction to conclude that the Commission *must* hold a hearing on every complaint, even if the complaint is beyond the Commission’s jurisdiction.

3. Regional Water and Wastewater Authority Act

The NCMRWA was created pursuant to the Regional Water and Wastewater Authority Act (“Act”), which is found in Title 75, Chapter 6, Part 3 of Montana Code Annotated. Complaint Ex. 2, § 5. The Act was adopted in 1999 to allow “public agencies” to secure a source of water and “to sell the water to public service districts, municipalities, publicly and privately owned water utilities, and others.”⁹ “Public agency” is defined in the Act to include any municipality, county, water district, sewer district, or other political subdivision.¹⁰

Under the Act, “[a]ny powers, privileges, or authority of a public agency of this state relating to public water supplies or the transportation or treatment of wastewater may be exercised jointly.”¹¹ Among the privileges afforded to municipalities and water districts is an exemption from Commission regulation.¹² Among the powers provided for municipalities and water districts is the power to set their own rates through a public process.¹³

The Act also allows “rural” customers, who are “afforded the use or the availability of service from an authority and [are] neither a district customer nor a municipal customer.”¹⁴ When an authority sells to a rural customer, it does so at the rates set in the public process provided in Mont. Code Ann. § 75-6-326.

⁵ See *Williamson*, ¶ 20 (dismissing a complaint); see also *Wibaux County Commissioners v. CenturyLink Communications, LLC*, Dkt. 2021.06.094, Order 7794b (Dec. 10, 2021).

⁶ *Great N. Utils. Co. v. Pub. Serv. Comm’n*, 88 Mont. 180, 203, 293 P. 294, 298 (1930) (“the Commission is a creature of, owes its being to, and is clothed with such powers as are clearly conferred upon it by the statute”).

⁷ *Thompson v. State*, 2007 MT 185, ¶ 28, 338 Mont. 511, 167 P.3d 867.

⁸ *State ex rel. Thacher v. Boyle*, 62 Mont. 97, 102, 204 P. 378, 379 (1921).

⁹ Mont. Code Ann. § 75-6-302.

¹⁰ Mont. Code Ann. § 75-6-304(4).

¹¹ Mont. Code Ann. § 75-6-305(1).

¹² Mont. Code Ann. §§ 69-33-101(2), 69-7-101.

¹³ Mont. Code Ann. §§ 75-6-326 (regional authorities), 69-7-111 (municipal utilities), 7-13-2275 (districts).

¹⁴ Mont. Code Ann. § 75-6-304(5); accord Mont. Code Ann. § 75-6-326(5), (9) (describing notices to and rates for rural customers); Mont. Code Ann. § 75-6-302 (allowing sales to districts, municipalities, utilities, and others).

4. Definition of “Public Utility”

Kevin asserts that regional authorities are not expressly exempted from the definition of “public utility” in Mont. Code Ann. § 69-3-102, unlike municipalities and districts. Kevin therefore reasons that the Commission has jurisdiction over NCMRWA.

For its part, NCMRWA acknowledges that the definition of “public utility” is broad.¹⁵ That definition provides as follows:

The term "public utility", within the meaning of this chapter, includes every corporation, both public and private, company, individual, association of individuals, and their lessees, trustees, or receivers appointed by any court that own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal:

...

(e) except as provided in chapter 7, water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities or towns or elsewhere;

...

(2) The term does not include:

(a) privately owned and operated water, sewer, or water and sewer systems that do not serve the public;

(b) county or consolidated city and county water or sewer districts as defined in Title 7, chapter 13, parts 22 and 23;

(c) except as provided in chapter 7, municipal sewer or water systems and municipal water supply systems established by the governing body of a municipality pursuant to Title 7, chapter 13, parts 42, 43, and 44¹⁶

Notably, the definition of “public utility” in the context of water service includes a “business, manufacturing, household use” requirement.¹⁷ No such use requirement exists in the definition as it applies to other utility services, like heat, electricity, transportation, or regulated telecommunications service.¹⁸

Although the NCMRWA brief asserts that Commission regulation would be redundant to the ratemaking process provided in the Act, redundancy alone does not establish an exception to the definition of “public utility.” However, because the Act allows municipalities and districts to

¹⁵ Br. in Support of Mot. to Dismiss 3.

¹⁶ Mont. Code Ann. § 69-3-101. The definition of *public utility* was amended in 2011 to include the express exemption for municipal water and sewer systems in (2)(c).

¹⁷ Mont. Code Ann. § 69-3-101(1)(e).

¹⁸ Mont. Code Ann. § 69-3-101(1)(a)–(f); *see also State ex rel. Thacher*, 62 Mont. at 102-04, 204 P. at 379-80.

“jointly” exercise their “powers, privileges or authority,” it may not be necessary for the Legislature to include a separate exception for authorities in the definition of “public utility.” In their briefing on the current motion, neither party has squarely addressed the legal question of whether the exemptions for water districts and municipal water systems from the definition of “public utility” are a privilege that can be exercised jointly through the NCMRWA.

5. Staff Recommendation

Because the parties have not briefed the legal relationship between the Act and existing exemptions in the statutory definition of “public utility,” staff recommends that the Commission order the parties to submit one opening brief and, if they desire, one responsive brief on the following question: Are the statutory exemptions for water districts and municipal water systems in the definition of “public utility” privileges that may be jointly exercised through a regional water authority pursuant to Mont. Code Ann. § 75-6-305?

The answer to that question may resolve, as a matter of law, the parties’ dispute over the Commission’s jurisdiction. In the interest of conserving resources, staff also recommends that the current procedural schedule and hearing date be vacated pending the Commission’s decision on the question posed above.

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Attorneys for North Central Montana Regional Water Authority

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

TOWN OF KEVIN,

Complainant,

vs.

NORTH CENTRAL MONTANA REGIONAL
WATER AUTHORITY, and the officers,
agents, or employees thereof,

Respondent.

REGULATORY DIVISION

DOCKET NO. 2021.05.073

**BRIEF IN SUPPORT OF NORTH
CENTRAL MONTANA REGIONAL
WATER AUTHORITY'S MOTION TO
DISMISS**

Respondent North Central Montana Regional Water Authority (hereinafter referred to as the "Authority"), by and through its counsel of record, Browning, Kaleczyc, Berry & Hoven, P.C., having moved the Public Service Commission to dismiss the Town of Kevin's administrative complaint, hereby respectfully submits this Brief in Support of its Motion.

INTRODUCTION

On May 21, 2021, the Town of Kevin (the "Town" or "Kevin") filed its Complaint against the Authority seeking the Public Service Commission ("PSC") to exert regulatory oversight over the Authority and take a role in setting the rates it charges to its member communities. The Town of Kevin also expressed a wide range of concern related to future events, such as terrorists taking over the Authority's waterlines, but did not assert that the town

had suffered any actual damages to date. As set forth herein, the PSC should decline regulatory oversight over these issues and dismiss the Town of Kevin's complaint at this time.

ARGUMENT

1. Regional Water Authorities are Not Regulated by the Public Service Commission as They Act as Water Distributors for their Member Communities and Do Not Sell Directly to Individual Customers.

The Authority was created pursuant to Title 75, Chapter 6, Part 3, Mont. Code Ann. and Title 7, Chapter 11, Part 1, Mont. Code Ann. by its Members utilizing the Interlocal Cooperation Act to administer the implementation of the Non-Core system through an Interlocal Agreement with the taxing entities participating in the Rocky Boy's/ North Central Montana Regional Water Authority project. The purpose of the Montana Interlocal Cooperation Act is to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other local governmental units on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities. In the case of the Authority, there are currently 22 water systems participating in the Non-Core System comprising water districts, cities and towns from across north central Montana. The Board of Directors oversees the operations of the Authority. The current board of directors is comprised of 27 individuals representing each water district, city or town that has signed the Interlocal Agreement. Each entity has at least 1 representative on the Board with no more than 3 representatives based on metered connections within the entity. Each member of the Authority is also a government entity that is accountable to their constituents.

To address the immediate challenges experienced by participating water systems the Authority developed an implementation plan of interim water service scenarios, whereby Member entities work together to leverage existing resources. Five interim service scenarios

have been completed which include North Havre County Water District (CWD) receiving water service from the City of Havre; South Chester CWD and Riverview Colony receiving water service from the Tiber CWD; Brady County Water & Sewer District (CWSD) receiving water service from the City of Conrad; the City of Cut Bank receiving a portion of their water from the City of Shelby and the Shelby North line which provides water service to the Nine Mile County Water District and Oilmont County Water District from the City of Shelby.

Pursuant to this plan and based on the current needs of the members, the Authority currently buys water from the City of Shelby, Tiber CWD, City of Conrad and City of Havre. July 2021 invoices indicating current water cost and volume for the month were attached to the data responses provided previously, along with the water purchase agreements. The Authority has not received notice from any planned rate increases from City of Shelby, Tiber CWD, City of Conrad or the City of Havre at this time.

In determining whether the PSC has jurisdiction to regulate the Authority, the first question is whether the Authority is a public utility or an exempt entity. The definition of "public utility" for PSC regulatory purposes is broad. It can be interpreted as encompassing production, delivery, or furnishing of water to others (see, generally, § 69-2-101, MCA). In practice, while the Authority does many of these functions, its transactions are wholesale transactions directly to its member communities and the Authority does not supply water directly to any end-use consumers. Instead, the Authority's member communities handle the "retail" transaction to the individual customers. Furthermore, all of the Authority's member communities, as municipal utilities, are not regulated by the PSC. "Wholesale" sales of water to an entity not regulated by the PSC have not customarily been viewed by the PSC as falling under the jurisdiction of the PSC. Such transactions have not historically been treated by the PSC as being jurisdictional. In *Matter of Boeing Co.* (petition for declaratory ruling), PSC Docket No. 92.1.2 (1992), the PSC essentially concluded that wholesale transactions involving delivery of water by a private supplier to a municipality or district did not cause the supplier to be a public utility.

Second, the Authority is registered with the Montana Secretary of State's office as an "authority" which is not a "corporation, both public and private, company, individual, association of individuals, and their lessees, trustees, or receivers appointed by any court" as the terms are used in Mont. Code Ann. § 69-3-101(1). Moreover, an "authority" is simply an association of otherwise exempt municipal entities and the Authority's wholesale water distribution activities serve only its members, so *Lockwood* likely exempts such services from PSC regulation (the regional water authority would be serving itself, not others, and therefore not be a public utility). See, generally, *Lockwood v. Anderson*, 168 Mont. 303, 542 P.2d 1217 (1975).

Therefore, based on the case law cited above, the Authority is not an entity that falls within the regulatory authority of the PSC as the Authority is simply an association of exempt municipal communities and it is only involved in wholesale water distribution for the benefit of its member communities.

2. Additional Oversight for Rate Setting by the Public Service Commission would be Redundant.

From a regulatory standpoint, the Montana Legislature has established the following procedure for the Authority to follow when setting rates for its member communities:

75-6-326. Rates, fees, and charges -- establishment and changes. (1) (a) The governing body shall by appropriate resolution make provisions for the payment of bonds issued pursuant to this part by taxing rates, fees, and charges, for the use of all services rendered by the authority.

- (b) The governing body of the authority shall review at least annually the rates, fees, and charges for services, facilities, and benefits directly afforded by the facilities, taking into account services provided and direct benefits received.
- (c) The rates, fees, and charges, in addition to grants or any other revenue, must be sufficient to:
 - (i) pay the costs of operation, improvement, and maintenance of the authority's water supply or wastewater transportation or treatment system;
 - (ii) provide an adequate depreciation fund;

- (iii) provide an adequate sinking fund to retire any bonds and pay interest on the bonds when due;
 - (iv) create reasonable reserves for the enumerated purposes; and
 - (v) allow for miscellaneous and emergency or unforeseen expenses.
- (2) The resolution of the governing body authorizing the issuance of revenue bonds may include agreements, covenants, or restrictions considered necessary or advisable by the governing body to effect the efficient operation of the system, to safeguard the interests of the holders of the revenue bonds, and to secure the payment of the bonds and the interest on the bonds.
- (3) Except as provided in subsection (9), prior to adopting a resolution to establish or change rates, fees, or charges, the governing body of the authority shall hold a public hearing.
- (4) Notice of the public hearing must be published as provided in 7-1-2121 in each county or counties in which customers of the authority are located. The published notice must contain:
- (a) the date, time, and place of the hearing;
 - (b) a brief statement of the proposed action; and
 - (c) the address and telephone number of a person at the authority who may be contacted for information regarding the hearing.
- (5) (a) The notice must be mailed to each rural customer and to the governing bodies of district customers or municipal customers at least 25 days and not more than 40 days prior to the public hearing.
- (b) The mailed notice must contain an estimate of the amount that a customer would be charged under the proposed resolution.
- (6) If the establishment or change in rates, fees, or charges proposed by the authority requires an increase in the rates, fees, or charges imposed by district customers or municipal customers, district customers and municipal customers shall comply with the provisions of 7-13-2275 or 69-7-111.
- (7) Any interested person, corporation, governmental body, or company may be present, be represented by counsel, and testify at the public hearing of the authority.
- (8) (a) The hearing may be continued by the governing body of the authority as necessary. After the public hearing, the governing body of the authority may, by resolution, impose, establish, change, or increase rates, fees, or charges.
- (b) Within 10 days after adoption of a resolution establishing or changing rates, fees, or charges of the authority, an officer of the authority shall send a copy of the resolution to each governing body of an affected district or municipal customer.

(9) The authority is not required to hold a public hearing for a cumulative rate increase of less than or equal to 5% within a 12-month period if the governing body of the authority provides notification of the increase to rural customers and to the governing bodies of district customers and municipal customers on whom the rate will be imposed at least 10 days prior to the passage or enactment of the ordinance or resolution implementing the increase.

The Authority further provides the following summary of how rates are calculated by the Authority for the benefit of the Public Service Commission's investigation. The basic template for water rates was developed by AE2S, engineering firm, in 2009 when the first interim water service project bringing water to North Havre CWD from the City of Havre was under design. Since then, each interim solution project has followed the same template for drafting water rates. See NC_PSC 1, the basic spreadsheet template utilized by the Authority to calculate rates, attached to the Authority's data responses, dated December 3, 2021. Water rates and the corresponding water purchase agreement are presented for Board of Director review and approval. See NC_PSC 2 – 31, the current rate calculation formula for the North Havre segment, attached to the Authority's data responses, dated December 3, 2021. The rates vary between the systems due to unique source of purchased water, difference in nominated capacity and difference in average water usage. The Authority maintains a robust accounting system that separately tracks for the revenue and costs for each segment. A preliminary water rate is drafted and presented to the Member in the initial phase of project design. As a project is closer to operation any updates to the water rate schedule are identified and presented to the Member along with a draft of the water purchase agreement. The water rate schedule and water purchase agreement are included as an agenda item during a regularly scheduled board meeting and require board approval prior to implementation.

As per the water purchase agreement, any rate changes require 60 days written notice. Written notice of rate increases are provided to Members via a letter. Rate increases are also noticed in the board meeting agenda and require board approval prior to implementation. NC_PSC 1 identifies the cost components of the rate schedule. Notification as per Mont. Code Ann. § 69-7-111 has only been applicable twice as any other rate increase approved by the board

has been 5% or less. Agendas and minutes from the June 2018 meeting and June 2016 were attached to the Authority's data responses, dated December 3, 2021. Letters providing notice to City of Cut Bank and Town of Brady were also attached. As per Mont. Code Ann. § 75-6-326 (9) the Authority is not required to hold a public hearing for a cumulative rate increase of less than or equal to 5% within a 12-month period if the governing body of the Authority provides notification of the increase to rural customers and to the governing bodies of district customers and municipal customers on whom the rate will be imposed at least 10 days prior to the passage or enactment of the ordinance or resolution implementing the increase. Copies of letters sent to Riverview Colony and South Chester CWD in June 2021 for September 2021 rate increase were attached to the Authority's data responses, dated December 3, 2021. Similar letters have been sent annually due to the rate increases from Tiber CWD.

Board Members for the Authority are provided monthly financial reports via email and such reports are posted on the Authority's website. Each report includes a balance sheet, year-to-date budget to actual report for utility operations, year-to-date budget to actual report for administrative activities funded with DNRC grant proceeds, and a project inception to date budget for actual construction activities. The reporting package also include the monthly checks written, detail listing of accounts receivable and water usage charts for each segment. The Board of Directors approves budgets annually which is typically in June. Any rate adjustments have also been approved at that time.

As per MT Code and the Authority by-laws, the Authority also receives an annual financial audit. Since inception the financial statement audit has always resulted in a "clean opinion" and since the hiring of a General Manager in 2010 the financial audit has never identified any material weakness or significant deficiencies related to financial reporting or the management of federal awards. See NC_PSC 2 – 31, 2020 Audit report, attached to the Authority's data responses, dated December 3, 2021. It is also worth noting that the Authority is the beneficiary of a DNRC grant to assist in covering administrative costs during the construction of the regional water project. The current funding is \$200,000 annually and covers

a significant portion of personnel costs, government affairs, office expenses, travel and insurance. This funding helps keep costs lower for the Non-Core operations and has allowed for the building of capital reserve funds and an operating reserve to provide a stable financial base as the utility system grows.

Ultimately, given the current regulatory structure and oversight by both a public board of directors chosen by its member communities and the current regulatory oversight provided by the DNRC, it would be redundant for the Public Service Commission to also participate in rate setting for the Authority.

3. The Remaining Allegations set Forth in the Town of Kevin’s Complaint Should be Dismissed as they Relate to Speculation about Future Events Unrelated to any Regulatory Role the Public Service Commission Could Provide.

The remaining allegations set forth in the complaint speculate on a wide range of horrible, yet unlikely outcomes that appear to have been raised purely to elicit fear. These allegations – such as the potential for terrorists to hijack the Authority’s water system in the future – do not appear to be connected with any regulatory role that the PSC could play in setting rates and providing oversight to a regional water system. They also do not relate to any specific damages that the Town of Kevin has actually suffered at this time. They also do not relate to any damages the Town of Kevin could suffer in the future as the Town of Kevin does not purchase water from the Authority. As such, these remaining allegations appear to be nothing but classic fear mongering devoid of any legal substance.

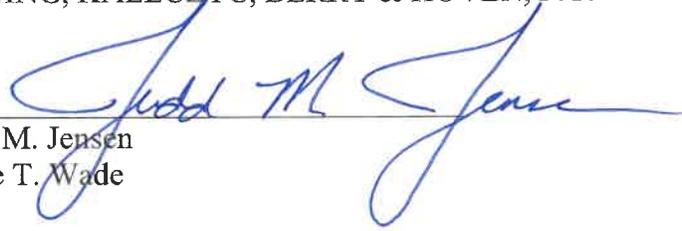
Ultimately, the Town of Kevin’s remaining allegations are attempting to improperly utilize the PSC to regulate future events that have not yet come to pass and are not seeking damages for any wrong the Town of Kevin has actually suffered. As such, there is no legal basis for the PSC to hear these issues and they should be dismissed at this time.

CONCLUSION

For the reasons set forth above, the Public Service Commission should dismiss the Town of Kevin’s complaint at this time.

Respectfully submitted this 17th day of December, 2021.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: 
Judd M. Jensen
Steve T. Wade

Attorney for North Central Montana Regional Water Authority

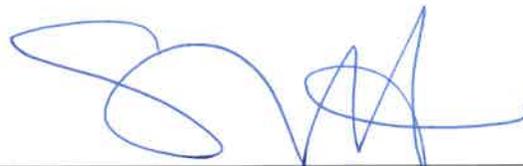
CERTIFICATE OF SERVICE

I hereby certify that North Central Montana Regional Water Authority's Brief in Support of the Authority's Motion to Dismiss in Docket No. 2021.05.073 has been e-filed with the Montana Public Service Commission ("Commission") and emailed to the email list below. Due to the workplace disruptions caused by the COVID-19 pandemic, the Commission has waived its requirement under Mont. Admin. R. 38.2.1209 to provide it with paper copies and has also approved electronic service only to the Service List.

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Attorney for Town of Kevin

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

<p>TOWN OF KEVIN, Complainant, vs. NORTH CENTRAL MONTANA REGIONAL WATER AUTHORITY, and the officers, agents, or employees thereof, Respondent.</p>	<p>DOCKET NO. _____ COMPLAINT</p>
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COMES NOW, Town of Kevin, acting by and through counsel, and pursuant to Admin.

R. Mont. 38.2.2101 -.2102, hereby submits following Complaint against North Central Montana
Regional Water Authority as follows:

PARTIES

1. Complainant Town of Kevin
c/o Jack G. Connors
DONEY CROWLEY P.C.
Guardian Building, 3rd Floor
50 South Last Chance Gulch
P.O. Box 1185
Helena, MT 59624-1185

(406) 443-2211

2. Respondent North Central Montana Regional Water Authority, and the officers, agents, or employees thereof

P.O. Box 2456
Havre, MT 59501
(406) 945-4343

FACTUAL ALLEGATIONS

3. In 1999 and 2000, a number of municipalities and county water and sewer districts joined together to form the North Central Montana Regional Water Authority (“Authority”). The Authority was formally created by the communities signing a document entitled *Interlocal Agreement Creating North Central Montana Regional Water Authority* (“2000 Agreement”), a copy of which is attached as Exhibit 1.

4. In 2006, the Authority was reconstituted and recreated under a new interlocal agreement. (“2006 Agreement”), a copy of which is attached as Exhibit 2.

5. The Authority operates by purchasing water and then distributing and reselling the water. To do so the Authority has constructed a series of pipelines, pump stations, and other facilities. Some but not all of the entities purchasing water from the Authority are members of the Authority.

6. For example, for the fiscal year ending June 2020, the Authority sold 5,392,451 gallons of water to the Brady County Water District; 15,846,544 gallons to the City of Cut Bank; 11,805,000 gallons to the North Havre County Water District; 5,583,144 gallons to Riverview Colony, Inc.; and 7,130,595 gallons to South Chester. *See* the Authority’s Water Sales Records attached as Exhibit 3.

7. In 2021, the Authority plans to start selling water to Oilmont County Water District, Nine Mile County Water District, and Galata County Water District. *See* Water Purchase Agreements attached as Exhibits 4 and 5.

8. The Authority's meeting minutes also reflect the possibility of selling water to additional entities in the future, including Eagle Creek Colony, Sage Creek Colony, Big Rose Colony, and Devon Water Inc.

9. A map of the Authority's planned pipelines and facilities is attached as Exhibit 6.¹

ANALYSIS

10. As explained above, the Authority is purchasing and then selling water to various entities in central Montana. To do so, it is using the facilities, plants, and equipment it has constructed for this purpose. This brings the Authority under the definition of a public utility in Mont. Code Ann. § 69-3-101.

11. Mont. Code Ann. § 69-3-101 contains exceptions for municipalities and county water districts. However, there is no exception in Title 69 for a regional water authority created under the Regional Water and Wastewater Authority Act, Mont. Code Ann. §§ 75-6-301 to -329.

12. Moreover, the Authority currently sells water to Riverview Colony, Inc., a non-profit corporation created by a Hutterite religious community located near Chester. The Authority plans to sell water to other non-profit corporations set up by Hutterite communities in the future, such as Eagle Creek Colony, Sage Creek Colony, Big Rose Colony. It has also discussed selling water to Devon Water, Inc. These corporations do not qualify for any of the exemptions in Mont. Code Ann. § 69-3-101.

¹ Additional pictures of the Authority's infrastructure are available on its website, <http://www.ncmrwa.com/>.

13. The Authority is clearly operating as a public utility, but according to the records of the PSC, it has never been regulated as such. Therefore, the PSC should open an investigation into the Authority and take all necessary actions to bring the Authority into compliance with the applicable laws and regulations.

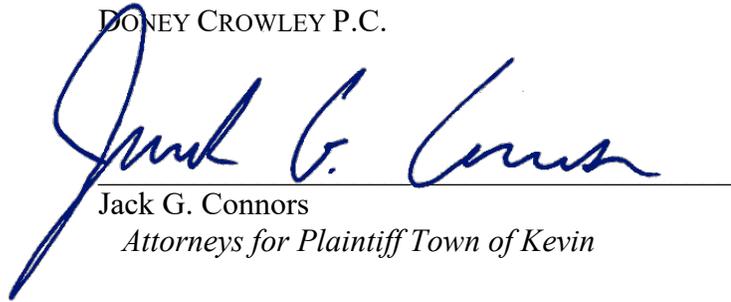
14. If the Authority is not regulated by the PSC, it is free to discriminate against its customers. For example, it could charge a community with a Republican mayor twice as much as a community with a Democrat mayor, or it could cut off service entirely to a customer if the customer expressed a political viewpoint the Authority does not agree with. Regulation by the PSC will ensure the Authority operates as a common carrier and provides service on a non-discriminatory basis.

15. The Authority also operates a complicated supervisory control and data acquisition or “SCADA” system that controls the pumps and control valves for its water distribution system. This system is accessible over the internet, and while the Authority claims the system is secure, without supervision and regulation from the PSC, there is no way to ensure the system is actually secure. The Authority’s SCADA system is likely similar to the computer system that controls the Colonial Pipeline, which was recently hacked. It is also unclear if the Authority has taken any steps to harden its system from other threats to the critical infrastructure. Thus, it is important for the PSC to regulate the Authority to protect the public from the devastating impacts that would occur if the Authority’s systems were compromised.

16. Finally, PSC regulation is required to ensure the Authority charges just and reasonable rates for the water it sells. Without proper supervision from the PSC, the Authority is free to exploit its quasi monopoly status and charge rates that are unjust and unreasonable under the circumstances.

RESPECTFULLY SUBMITTED this 21st day of May, 2021.

DONEY CROWLEY P.C.



Jack G. Connors
Attorneys for Plaintiff Town of Kevin

CERTIFICATE OF SERVICE

I hereby certify that Town of Kevin’s Complaint against North Central Montana Regional Water Authority in Docket No. _____ has been e-filed with the Montana Public Service Commission (“Commission”) and emailed to the email list below. Due to the workplace disruptions caused by the COVID-19 pandemic, the Commission has waived its requirement under Mont. Admin. R. 38.2.1209 to provide it with paper copies and has also approved electronic service only to the Service List.

Date: May 21, 2021

_ /s/ Jack Connors _____

Email List:

Montana Public Service Commission
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Attorneys for North Central Montana Regional Water Authority

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

TOWN OF KEVIN,

Complainant,

vs.

NORTH CENTRAL MONTANA REGIONAL
WATER AUTHORITY, and the officers,
agents, or employees thereof,

Respondent.

REGULATORY DIVISION

DOCKET NO. 2021.05.073

**NORTH CENTRAL MONTANA
REGIONAL WATER AUTHORITY'S
MOTION TO DISMISS**

Respondent North Central Montana Regional Water Authority (hereinafter “the Authority”), by and through its attorneys Judd M. Jensen and Steve T. Wade of the law firm Browning, Kaleczyc, Berry & Hoven, P.C., hereby moves the Public Service Commission to dismiss the Town of Kevin’s administrative complaint as the Public Service Commission does not have regulatory oversight over water distributors like the Montana’s regional water authority as it does not sell directly to individual customers. Given the current oversight of both a public board of directors of its Members and the Department of Natural Resources and Conservation it would also be redundant for the Public Service Commission to also participate in the Authority’s rate setting. Finally, but perhaps most critically, the Town of Kevin has not claimed to suffer any actual damages but instead simply asserts a wide range of speculation on future events –

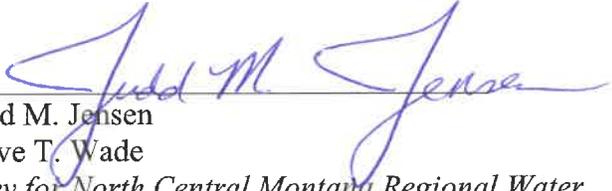
such as terrorist attacks on the Authority's pipeline system - that fall outside the regulatory role of the Public Service Commission.

Pursuant to Uniform District Court Rule No. 2, Counsel for the Authority contacted Counsel for the Town of Kevin and Counsel for the Town of Kevin opposes this Motion. A brief in support is filed contemporaneously herewith.

Respectfully submitted this 17th day of December, 2021.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By:


Judd M. Jensen

Steve T. Wade

Attorney for North Central Montana Regional Water Authority

CERTIFICATE OF SERVICE

I hereby certify that North Central Montana Regional Water Authority's Motion to Dismiss in Docket No. 2021.05.073 has been e-filed with the Montana Public Service Commission ("Commission") and emailed to the email list below. Due to the workplace disruptions caused by the COVID-19 pandemic, the Commission has waived its requirement under Mont. Admin. R. 38.2.1209 to provide it with paper copies and has also approved electronic service only to the Service List.

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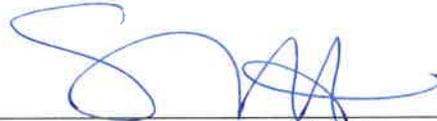
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Attorneys for Town of Kevin

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Attorney for City of Shelby



BROWNING, KALECZYC, BERRY & HOVEN, P.C.

OBJECTIONS

First, the Authority's answer to Paragraph 12 of the Complaint was misrepresented in the Town of Kevin's response brief. The Authority's actual response is as follows: "The Authority admits that it currently sells water to the Riverview Colony for use in its public water system, but denies the remaining allegations in Paragraph 12 of the Complaint as the sale of water to a non-profit corporation by a municipal or county water district or regional water authority does not change whether those entities are public utilities under the exceptions to the definition referenced above." Moreover, these sales are entirely wholesale transactions as demonstrated by the signed Water Purchase Agreement and last three years of sales records. *See Exhibits A and B to the Aff. of Jody Hellegaard* (Dec. 28, 2021), filed simultaneously with these objections. It is also worth noting that the Riverview Colony is still a regulated public drinking water system but because of the colony's structure and religious status they cannot be a governmental entity which is why they cannot be a full member of the Authority. That said, such water sales from the Authority are fully authorized in the initial treaty with the Chippewa Cree Tribe and the later approvals of both the state and federal governments. While the full treaty and legislation goes beyond the scope of this short objection, a brief history of this process is set forth below for informational purposes.

The Chippewa Cree Tribe of the Rocky Boy's Reservation and the State of Montana, through the Reserved Water Rights Commission, negotiated a settlement of the Tribe's Water Rights Claims. *See Aff. of Jody Hellegaard*, § 3 (Dec. 28, 2021). The Compact, ratified by the 1997 Montana Legislature and signed by President Clinton in December of 1999, provided a water allocation of 10,000 acre feet to the Tribe from Lake Elwell (Tiber Reservoir), south of Chester, Montana. *Id.* In addition to providing a water supply for the Tribe, the project was also expanded to provide water service to residents of Chouteau, Hill, Liberty, Pondera, Teton, Glacier and Toole counties in Montana. *Id.* On December 12, 2002, President Bush signed S.2017, the Rocky Boy's/North Central Montana Regional Water System (NCRMRS) Act of 2002 (PL 107-331, 116 Stat. 2859) as the final step in the federal approval process and the

beginning of a project to improve the quality of life for the Tribe and residents of north central Montana. *Id.*

The Authority's second objection is that the Town of Kevin's response brief seems to imply other sales from the Authority to non-member entities. This is entirely incorrect as the Authority does not sell to any other colonies or corporations. *See Aff. of Jody Hellegaard*, § 5 (Dec. 28, 2021). In a similar fashion, the Town of Kevin's response brief seems to imply that only "some" of the Authority's members are exempt entities, without ever stating which ones are non-exempt entities. This implication is misleading as all of the Authority's members are exempt entities. *See Aff. of Jody Hellegaard*, § 6 (Dec. 28, 2021).

A full list of the current members and the corresponding board of directors is as follows:

- Town of Big Sandy - Shaud Schwarzbach
- Brady CWSD - Julie Orcutt
- Town of Chester - Tonia Wickum
- City of Conrad - Wendy Judisch
- City of Conrad - Cheryl Curry
- City of Conrad - David Zimbelman
- City of Cut Bank - Mike Wineman
- City of Cut Bank - Jim Suta
- City of Cut Bank - Robert Smith
- Town of Dutton - Susan Fleshman
- Galata CWD - Doug Hellenger
- City of Havre - Tim Solomon
- City of Havre - Chris Klobofski
- City of Havre - Jeff Jensen
- Hill CWD - Dan Hybner
- Hill CWD - Rob Moog
- Town of Kevin - Bob Fagan
- Loma CWD - Steve Bahnmilller
- Nine Mile CWD - Lisa Kearns

- North Havre CWD - Larry Bonderud
- Oilmont CWD - Mike Wallewein
- City of Shelby - Jade Goroski
- City of Shelby - Lorette Carter
- City of Shelby - Gary McDermott
- South Chester CWD - Chuck Saxton
- Sweetgrass CWSD - Brian Scott
- Town of Sunburst - Holly Hovland
- Tiber CWD - Carl Flesch

Id. It should be noted that the Town of Kevin currently disputes its membership in the Authority and has sought a declaratory judgment in District Court. This case is still pending.

Ultimately, as the actual answer by the Authority to paragraph 12 of the Complaint contradicts the statements in the Town of Kevin's response brief and its other misleading implications in the brief are devoid of any factual support, the Town of Kevin's response brief is not credible and should simply be ignored.

CONCLUSION

Pursuant to the Authority's prior brief in support of its Motion to Dismiss and the arguments set forth above, the Court should dismiss the Town of Kevin's Complaint at this time.

Respectfully submitted this 30th day of December, 2021.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: _____

Judd M. Jensen
Steve T. Wade

*Attorney for North Central Montana Regional Water
Authority*

CERTIFICATE OF SERVICE

I hereby certify that North Central Montana Regional Water Authority's Objection in Docket No. 2021.05.073 has been e-filed with the Montana Public Service Commission ("Commission") and emailed to the email list below. Due to the workplace disruptions caused by the COVID-19 pandemic, the Commission has waived its requirement under Mont. Admin. R. 38.2.1209 to provide it with paper copies and has also approved electronic service only to the Service List.

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Attorneys for Complainant Town of Kevin

PUBLIC SERVICE COMMISSION FOR THE STATE OF MONTANA

<p>TOWN OF KEVIN, Complainant, vs. NORTH CENTRAL MONTANA REGIONAL WATER AUTHORITY, Respondent.</p>	<p>REGULATORY DIVISION DOCKET NO. 2021.05.073 TOWN OF KEVIN'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS</p>
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COMES NOW Complainant Town of Kevin and responds in opposition to Respondent North Central Montana Regional Water Authority's Motion to Dismiss as follows:

INTRODUCTION

It is clear the Authority does not want the PSC to hear the merits of this cases and then act to bring the Authority into compliance with Montana's public utility laws. While the Authority desire to operate free of oversight from the PSC, there is no legal authority for the Authority's Motion to Dismiss. Instead, once a complaint is filed and accepted by the PSC, the matter must be resolved after a hearing. Since there is no basis for the Authority's motion it must be denied.

Moreover, even if the PSC were to look to the standard for a motion to dismiss under Rule 12(b)(6) of the Montana Rules of Civil Procedure, the Authority's motion is still deficient. Under Rule 12(b)(6) all well pled facts in a Complaint are taken as true and all reasonable inferences are drawn in favor of the responding party. Kevin's Complaint states that the Authority operates as a public utility when it purchases water and then sells the water for a profit to the Authority's customers using a pipeline and associated facilities owned by the Authority. Given the facts in Kevin's Complaint, which must be taken as true, there is sufficient evidence to find the Authority operates as an unregulated public utility and thus the PSC should deny the Motion to Dismiss.

ANALYSIS

I. There is no procedure for the party subject to a PSC complaint to ask the Commission to dismiss the complaint without holding a hearing.

The Authority cites no authority that would allow it to move to dismiss in this proceeding, as there is none. Once a complaint is filed and accepted by the PSC, the Commission "shall give the public utility and the complainant or complainants at least 10 days' notice of the time when and the place where such hearing will be held." Mont. Code Ann. § 69-3-325. "If, upon a hearing and due investigation," the Commission finds a violation of the applicable laws, it may take appropriate actions against the utility. Mont. Code Ann. § 69-3-330(1). Thus, according to Montana law, the PSC must hold a hearing on a complaint after it has been accepted.¹

The Authority's brief does not cite a single prior decision where the PSC dismissed a complaint before holding hearing, and there appears to be no precedent supporting the requested relief. Since there is no provision in Title 69 or the PSC's administrative rules that allows the party subject to a complaint to file a motion to dismiss, the Authority's motion should be denied.

¹ In contrast, by statute, the PSC may deny an application for a Class D license without a public hearing if the Commission has denied an application for the same route or service territory, based on the finding that the public convenience and necessity do not require the proposed service. Mont. Code Ann. § 69-12-321(4).

II. Taking the factual allegations as true, Kevin’s Complaint states a viable claim against the Authority.

With no statutory or legal precedent for the Authority’s Motion, it is no surprise that the Authority does not mention any applicable legal standard that the Commission should apply in evaluating whether to grant the Motion to Dismiss. The Authority’s Motion, however, is similar in substance to a motion to dismiss under Rule 12(b)(6), M. R. Civ. P., and thus, were the Commission to reach the merits of the motion, it should apply the well-established standard for a Rule 12(b)(6) motion. *See AmeriMont, Inc. v. NorthWestern Energy*, PSC Docket No. D2018.1.5, Order No. 7603 (June 4, 2018) (adopting the standard under Rule 12(b)(6) and holding “The Commission will grant NorthWestern’s Motion only if there are no set of facts, construed in the most favorable light to AmeriMont, that the Complaint presents a justiciable claim.”).²

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M. R. Civ. P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.

Id. ¶ 4 (quoting *Samson v. State*, 285 Mont. 310, 313, 948 P.2d 232, 234 (1997)).

Here, Kevin’s Complaint alleges that the Authority operates as a public utility when it purchases and then sells water for a profit to various entities. As the Authority notes in its Brief, “The definition of ‘public utility’ for PSC regulatory purposes is broad. It can be interpreted as encompassing production, delivery, or furnishing of water to others (see, generally, § 69-2-101, MCA).” Brief at 3. The list in Mont. Code Ann. § 69-2-101 is disjunctive and the Authority even admits that it “does many of these functions.” *Id.* Thus, constructing the allegations in the light most favorable to Kevin, the Complaint properly states a claim that the Authority operates as an unregulated public utility and the Motion should be denied.

² The decision in *AmeriMont*, assumed without discussion that a party could file a motion to dismiss in response to a complaint. Since the issue was not addressed in *AmeriMont*, it should not be used as precedent that there is a legal basis for the Authority’s Motion to Dismiss.

III. It is immaterial that some of Authority’s customers are statutorily exempt from the definition of a public utility.

The Authority tries to argue that it is exempt from regulation because some of its customers are cities, towns, and water districts that are exempt from regulation by the PSC under Mont. Code Ann. § 69-3-101(2). While cities, towns, and water districts are statutorily exempt from the definition of a public utility, regional water authorities are not. And according to the Authority, “[n]one of the . . . legal definitions [in Mont. Code Ann. § 69-3-101(2) for exempt entities] accurately defines the scope or purpose of the Authority.” Authority’s Answer to Data Request TOK-014(c). Thus, the Authority is not excluded from the definition of a public utility.

Moreover, the argument that the PSC should look to the exempt status of some of its customers and not whether the Authority itself is exempt makes little sense. If adopted, any public utility could escape regulation by the PSC as long as it could show that some of its customers were exempt. This is not what the statute provides as the exemptions in Mont. Code Ann. § 69-3-101(2) are narrowly defined and specific. Thus, the PSC should reject the Authority’s attempt to write a loophole into the definition of a public utility that would allow it to evade regulation by the Commission.

IV. The Authority sells water directly to customers who are not exempt entities.

Next, the Authority falsely asserts that it simply acts as a wholesaler of water to exempt municipal entities. The argument, however, overlooks the fact that it sells water directly to a number of corporations that are not exempt. *See, e.g.*, Authority’s Answer ¶ 12 (“The Authority admits that it currently sells water to the Riverview Colony . . .”).

Given that the Authority is selling water directly to end customers for a profit, this situation is different than the facts in the *Boeing Company* declaratory ruling cited by the Authority. In the *Boeing Company* decision, the PSC found that Boeing Company and the Montana Aviation Research Company (“MARCO”) were not a public utility because “MARCO does not perform the requisite ‘production, delivery, or furnishing to or for’ others.” *In the*

Matter of Boeing Company and Montana Aviation Research Company, PSC Docket No. 92.1.2, Declaratory Ruling ¶ 17 (Mar. 6, 1992). Here, the Authority is responsible for the production, delivery, *and* furnishing of water to end customers, including willing members of the public within the service area of the Authority’s pipeline system. This includes the Authority selling water to Riverview Colony, Eagle Creek Colony, Sage Creek Colony, Big Rose Colony, and Devon Water Inc., all of which are not members of the Authority, and not exempt from regulation by the PSC under Mont. Code Ann. § 69-3-101(2). And unlike the entities mentioned in the *Boeing Company* decision, these entities are the ultimate end user of the water, and the Authority is not merely acting as a wholesale distributor of water.

The Authority also argues that it “is not a ‘corporation, both public and private, company, individual, association of individuals, and their lessees, trustees, or receivers appointed by any court’ as the terms are used in Mont. Code Ann. § 69-3-101(1).” Brief at 4. Once again, this argument is misplaced as, according to Montana law, “the [A]uthority is a public body, corporate and politic.” Mont. Code Ann. § 75-6-310. Thus, it is within the definition of a corporation in Mont. Code Ann. § 69-3-101.

Finally, the Authority argues “*Lockwood* likely exempts such services from PSC regulation.” Brief at 4. In *Lockwood*, the Montana Supreme Court held that the Lockwood Water Users Association was not a public utility because “service is rendered only to members . . .” *Lockwood v. Anderson*, 168 Mont. 303, 542 P.2d 1217, 1221 (1975). But the Authority renders service to non-members, including Riverview Colony, Eagle Creek Colony, Sage Creek Colony, Big Rose Colony, and Devon Water Inc. In addition, the evidence at the hearing will show that many additional nonmembers have taps on the Authority’s pipeline. Thus, under *Lockwood*, the Authority is a public utility.

V. The DNRC does not regulate the Authority.

The Authority argues that “it would be redundant for the Public Service Commission to also participate in rate setting for the Authority” because “regulatory oversight [is] provided by

the DNRC.” Brief at 8. It is not clear what “regulatory oversight” the Authority is referring to, as DNRC has no power to regulate the Authority and the Authority cites no legal authority to support its argument. While DNRC has awarded certain to the Authority, it has no power to regulate the rates charged by the Authority. Likewise, DNRC has no jurisdiction over the operations of the Authority. Thus, the Authority reference to “regulatory oversight provided by the DNRC,” is a red herring.

Although the Authority considers the PSC to be “redundant,” the desire not to be regulated does not change the fact that the utility is subject to the jurisdiction of the PSC. To support its argument that the PSC is redundant, the Authority cites the statutory provision for how it must set its rates. But Mont. Code Ann. § 75-6-326 is a *procedural* statute and does not require the rates adopted by the Authority to be “reasonable and just” or otherwise limit the rate the Authority may charge its customers. That means the Authority could adopt different rates for different customers, including higher rates for customers the Authority disfavors, if the *process* in Mont. Code Ann. § 75-6-326 is followed. On the other hand, it is the PSC’s responsibility to ensure “[t]he charge made by any public utility for . . . water . . . delivered, or furnished . . . [are] reasonable and just” Mont. Code Ann. § 69-3-201, -301, and -302. While Mont. Code Ann. § 75-6-326 establishes the process by which the Authority must adopt its rates, it is the PSC’s responsibility and duty to review and approve the rates once adopted.

The Authority also focuses narrowly on the rate setting process, but the PSC has *broad* authority over the operations of a public utility, beyond just the rate setting process. Mont. Code Ann. § 69-3-103 (“said commission shall have power to prescribe rules of procedure and to do all things necessary and convenient in the exercise of the powers conferred by this chapter upon the commission”). This includes the power to ensure the utility operates safely and in the public interest. *AmeriMont, Inc. v. NorthWestern Energy*, PSC Docket No. D2018.1.5, Order No. 7603 (June 4, 2018) (“Mont. Code Ann. § 69-3-321 vests the Commission with authority to investigate NorthWestern’s rates, practices, or acts that are unreasonable or unjustly discriminatory, or whether any service is adequate.”). As long as a complaint alleges that a public utility is charging

illegal rates engaging in discriminatory practices, “the Commission clearly has authority to investigate under its complaint statute.” *Id.*

Taking the allegations in the Complaint as true, that the Authority’s computer systems could be comprised the operates and that it could operate in a discriminatory manner against customers based on political beliefs or other improper criteria, the Commission has authority to proceed with consideration of Kevin’s Complaint.

CONCLUSION

Taking the allegations in Kevin’s Complaint as true, there is a valid basis for Kevin’s Complaint, and the PSC should deny the Motion to Dismiss.

DATED this 27th day of December, 2021.

DONEY CROWLEY P.C.

/s/ Jack G. Connors

Jack G. Connors
Samuel J. King
Attorneys for Complainant Town of Kevin

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Town of Kevin's Response in Opposition to Defendant's Motion to Dismiss* was served via email on this 27th day of December, 2021, upon the following:

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City of Shelby
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Attorney for City of Shelby

/s/ Jack G. Connors

PSC Work Session Request

Date of request: January 25, 2022

(to be included on the agenda for the next following business meeting request must be made by 5:00 p.m. Monday)

Week work session to be held: February 1, 2022

Request is:

routine -- on agenda, normal day and time of work sessions

special -- on agenda, special day or time:

out-of-cycle -- not on agenda, day and time:

other meeting, day, time and location:

Called by: Lucas Hamilton, Will Rosquist

Participants: Lucas Hamilton, Will Rosquist

Docket Number: 2021.11.132

Applicant or Petitioner: NorthWestern Energy

Case or Subject: Application for Approval of Energy Storage Agreement

Purpose: To decide whether NorthWestern's Application is adequate.

Staff Recommended, Suggested or Alternative Motions:

Additional Information:

Reference materials: Staff Memorandum, MCC Comments, NorthWestern Comments

(memos and materials to be distributed by last work day of week request is made, if possible)

Estimated time required: 15 minutes

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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA**

IN THE MATTER OF NorthWestern) REGULATORY DIVISION
Energy’s Application for Approval of)
Energy Storage Agreement) DOCKET NO. 2021.11.132

<p>NorthWestern Energy’s Response to the Montana Consumer Counsel’s Request</p>
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NorthWestern Energy (“NorthWestern”) opposes the Montana Consumer Counsel’s (“MCC”) request that the Montana Public Service Commission (“Commission”) find NorthWestern’s application inadequate to satisfy the Commission’s minimum filing requirements. The MCC requests that the Commission require NorthWestern to conduct analyses that are not required by the minimum filing requirements. The MCC’s position would require a party to anticipate and establish the entirety of the case, including any information that might be sought in discovery, in an initial application. That position is not reasonable, does not comport with the actual minimum filing requirements, and does not serve the public interest or aid in the adjudication of the Commission’s workload. NorthWestern respectfully asserts that the volume of testimony,

exhibits, and workpapers more than satisfies the minimum filing requirements contained in Mont. Admin. R. 38.5.8228(2).

I. The Commission Has, in Effect, Determined that the Information Submitted in this Filing Satisfies the Minimum Filing Requirements.

The MCC's argument fails to appreciate that the Commission already reviewed substantially the same information in Docket No. 2021.02.022 that NorthWestern filed in this docket and found that information to comply with the minimum filing requirements. The MCC's request would require the Commission to divert from the basis for its decision in Order No. 7781x, Docket No. 2021.02.022 (July 26, 2021). In that order, the Commission determined that NorthWestern's testimony and documentation of its evaluation of the competitive bid proposals, and its testimony and documentation of the costs associated with acquisition of the Beartooth Battery, satisfied the Commission's minimum filing requirements in Mont. Admin. R. 38.5.8228 (the "Rule") for an application for approval to acquire the Beartooth Battery and recover costs through the Power Costs and Credits Adjustment Mechanism ("PCCAM"). NorthWestern has made the same request in this docket and submitted the same information. Yet, despite the Commission's order, the MCC now argues that essentially the same information somehow no longer satisfies the requirements in the Rule.

The Commission must reject the MCC's request because it requires an unreasonable interpretation of the Rule. *See Clark Fork Coal. v. Dep't of Env't Quality*, 2012 MT 240, ¶ 19, 366 Mont. 427, 288 P.3d 183 (finding deference to agency interpretation of a rule so long as it lies within the range of reasonable

interpretation permitted by the wording in the rule). The MCC articulates no basis for the Commission to find in one instance that information is sufficient to meet the minimum filing requirements, and then find in another instance that the same information is not sufficient. The Commission must affirm its prior order because the MCC failed to articulate a rational basis to deviate from it.

II. The Minimum Filing Requirements Do Not Require the Commission to Make a Determination on the Merits of the Case.

The MCC's complaint that NorthWestern did not provide an adequate comparison of the Beartooth Battery to other resources goes beyond the criteria in the Rule to the merits of the case. The MCC concludes that NorthWestern's three-phase evaluation process is not satisfactory because NorthWestern evaluated, and selected, a portfolio of resources rather than one individual resource. Then, by demanding an additional analysis, the MCC asks the Commission to require NorthWestern to assume it did not select a portfolio of resources from the competitive solicitation and to conduct an evaluation based on this falsehood. The Commission's Rule contains no requirement for such hypothetical analyses. And MCC's concerns over NorthWestern's analyses go to the merits of the case, not the minimum filing requirements.

Similarly, the MCC also claims that NorthWestern did not meet the Rule's requirement for a comparison of costs because NorthWestern did not request Commission approval of specific rates. Again, the MCC extends its comments beyond the minimum filing requirements to the merits of the case. NorthWestern provided the exact costs of the Beartooth contract, as well as the costs of all other

proposals into the RFP. In its testimony, NorthWestern explained that the addition of the Beartooth Battery will likely result in an increase in capacity costs and a decrease in energy costs for customers. But pursuant to the PCCAM tariff, Base Rates in late 2023 or early 2024 will not only be affected by the Beartooth Battery but will also be affected by other changes in the portfolio that occur between now and then, as well as changes in market prices for power and natural gas. For example, in 2022 alone, NorthWestern expects an additional 160 megawatts of Qualifying Facility generation on its system. Thus, a forecast of the PCCAM Base Rates over three years from now is difficult to predict. So, while the MCC may be interested in such a forecast, the Commission has not included that forecast as a component of the minimum filing requirements.

III. Conclusion.

The Commission must reject the MCC's request to evaluate the NorthWestern application, testimony, exhibits, and workpapers against criteria that are not contained in the Commission's Rule. The Commission has already determined that the information in NorthWestern's application satisfied the minimum filing requirements. There is no basis for the Commission to reverse this decision.

Respectfully submitted this 28th day of January 2022.

NORTHWESTERN ENERGY

By: /s/ Ann B. Hill
Ann B. Hill, Attorney

CERTIFICATE OF SERVICE

I hereby certify that NorthWestern Energy's Response to the Montana Consumer Counsel's Request in Docket No. 2021.11.132 has been e-filed with the Montana Public Service Commission ("Commission") and emailed to the email list below.

Date: January 28, 2022

/s/ Tracy Lowney Killoy
Tracy Lowney Killoy
Administrative Assistant

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PSC Work Session Request

Date of request: January 24, 2022

(to be included on the agenda for the next following business meeting request must be made by 5:00 p.m. Monday)

Week work session to be held: February 1, 2022

Request is:

- routine -- on agenda, normal day and time of work sessions
- special -- on agenda, special day or time:
- out-of-cycle -- not on agenda, day and time:
- other meeting, day, time and location:

Called by: Zack Rogala

Participants: Legal Division

Docket Number: N/A

Applicant or Petitioner: N/A

Case or Subject: Litigation Strategy regarding Broad Reach v. Mont. PSC

Purpose: To discuss next steps regarding Broad Reach appeal.

Staff Recommended, Suggested or Alternative Motions:

Additional Information: This work session will be closed to the public

Reference materials:

(memos and materials to be distributed by last work day of week request is made, if possible)

Estimated time required: 20 minutes