

## **Exhibit Number: 6**

**The following exhibit is several assorted documents that exceeds the 10-page limit therefore it cannot be scanned. A small portion has been scanned to aid in your research for information. The exhibit is on file at the Montana Historical Society and can be viewed there.**

Re: HOUSE BILL NO. 733

EXHIBIT 6  
DATE 2/18/05  
HB 733

**Submission in favor of repealer of MCA 69-8-215.**

As counsel for the certified class of employees and other shareholders of the former Montana Power Company, we ask the legislature to repeal the so-called "Ratepayer and Shareholder Protection" Act, now codified as MCA 69-8-215. HB 733 does just that.

Passing HB 733 removes a blatantly unconstitutional law from Montana statutes, and Montana's law is returned to a position that is similar to all other states regarding the law of corporate mergers.

Passing HB 733 will not endanger ratepayers or Northwestern employees.

Passing HB 733 will likely have no effect on Northwestern - the Montana Power shareholders have reached a proposed settlement agreement with Northwestern and the other defendants that is likely to be approved. However, in the event it is not, the class of employees and other shareholders of the former Montana Power Company should have the right to pursue their share of ownership of the reorganized corporation.

**History**

- \* From December 1999 to March 2000 (following the deregulation fiasco) Montana Power Company sold all of its power generation and energy-related businesses to finance a risky venture in the telecom business. This decision was made without shareholder approval.
- \* In August of 2001, a class action lawsuit was brought by a group of Montanans on behalf of thousands of other Montanans, as well as other shareholders.
- \* Montana Power Company thereafter underwent a corporate reorganization and merger which made Montana Power, LLC the legal successor to "all debts, liabilities and other obligations" of the former Montana Power Company. § 35-1-1203(1)(c), MCA.
- \* NorthWestern Corporation purchased Montana Power, LLC, including all of its assets and liabilities, and specifically including the liability for the Montana Power Company shareholder lawsuit. NorthWestern emphasized it was taking liabilities as well as assets of the former Montana Power Company when seeking approval from the Montana Public Service Commission. NorthWestern then renamed Montana Power, LLC "NorthWestern Energy."

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\* Before the sale closed, NorthWestern asked Touch America to indemnify and hold it harmless for the liabilities of the outstanding Montana Power Company shareholder lawsuit. Touch America refused. NorthWestern went through with the purchase anyway and the deal closed on February 15, 2002.

\* In the 2003 legislative session, NorthWestern lobbied for and obtained legislation, SB 458, which said that the shareholders would not be allowed "any portion of a civil judgment" against NorthWestern Energy in the shareholder litigation.

### **Events Since the Enactment of § 69-8-215 Disprove its Rationale and Intended Effect.**

Events since the passage of the "Ratepayer and Shareholder Protection Act" have proven that it provided neither protection to the ratepayers nor to the shareholders of NorthWestern Corp.

While NorthWestern heavily lobbied this Legislature with the *claimed* concern that the Montana Power Company shareholder litigation could cause a bankruptcy of NorthWestern, it is clear that NorthWestern was doomed to bankruptcy regardless. On September 14, 2003, less than 5 months after the approval of this law, NorthWestern filed for bankruptcy.

While NorthWestern heavily lobbied this Legislature with the *claimed* assurance that this bill would protect NorthWestern Corp.'s shareholders, in fact, there was no equity in the company to be protected. As a result of the now confirmed Plan of Reorganization, shareholders of NorthWestern get nothing. The value of the utility business now benefits the creditors of NorthWestern, *excluding the creditor claims of the Montana employees and other shareholders of the former Montana Power Company.*

While NorthWestern heavily lobbied this Legislature with the *claimed* concern that a bankruptcy would adversely affect the Montana utility and rate payers, in fact the bankruptcy has greatly enhanced the financial stability of the Montana utility and the concerns of the Montana Public Service Commission were fully addressed to the benefit of all Montana ratepayers.

Notwithstanding this statute's patent unconstitutionality, NorthWestern filed a motion to dismiss the claims of Montana employees and other shareholders of the former Montana Power Company in the shareholder litigation immediately upon the effective date of the law. During the pendency of that motion, and under the cloud of the statute, the Montana Power Company shareholders negotiated a settlement under which they will be allocated \$29 million in insurance proceeds, and they release their claim to participate with other NorthWestern creditors as new owners of the company under the reorganization plan. This settlement requires the approval of the United States District Court for Montana, as well as

the Bankruptcy courts for each of NorthWestern Corp. and Touch America.

*In short, the only effect this statute has had was to impair the rights of former Montana Power Company employees (and other shareholders of the former Montana Power Company) to fairly participate in the ownership of the "new" (reorganized) NorthWestern Corp., along with other creditors of the corporation.*

### **The law is unconstitutional**

MCA 69-8-215 violates no less than ten provisions of the Montana and U.S. Constitutions. The Montana Constitution prohibits "special privileges and immunities" but the bill gives complete immunity and special privilege to precisely one corporation (NorthWestern) at the expense of thousands of Montanans.

Article II, § 16, constitutionally guarantees Montanans' "full legal redress" for legal wrongs. While Montana law makes NorthWestern Energy liable, SB 458 prevents the shareholders from collecting any money on a judgment obtained for that wrong.

Both the Montana and U.S. Constitutions guarantee that contracts and filed lawsuits may not be retroactively impaired. SB 458 takes away rights after the contract was signed, after it was breached, and even after the lawsuit was filed - SB 458 (MCA 69-8-215) provides that its special immunities and privileges "applies retroactively". A complete legal analysis of the bill is attached hereto.

We have spoken to dozens of attorneys in both the plaintiff and defense bar and several former justices and a former chief justice of the Montana Supreme Court. Nearly everyone agrees this law is unconstitutional.

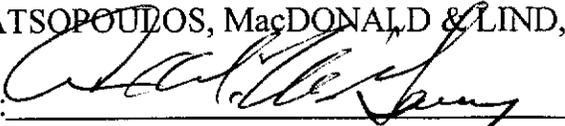
### **Conclusion**

MCA 69-8-215 is an unjust and unconstitutional law which has no place on the books of the State of Montana. Events since the enactment of this law have proved that its intended effect was not accomplished and the rationale for passage was false. While repeal of this law will only benefit the former Montana Power Company employees (and other shareholders of the former Montana Power Company) in the unlikely event that the now pending lawsuit settlement is disapproved, that potential opportunity is the least that is owed to the Montana citizens who have deprived of their ability to fairly pursue recovery of their lost retirements and investments in the former Montana Power Company.

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Respectfully submitted this 18 day of February, 2005

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## Analysis of Constitutionality of SB 458 (MCA 69-8-215)

### FACTS

On or about December 17, 1999, and in the days thereafter, the Montana Power Company committed itself to a disposition of substantially all of its assets, including all of its power-related assets. Such a sale of substantially all of the assets and fundamental transformation of the company triggered the following legal rights and remedies of the Montana Power Company shareholders:

1. They were entitled to vote to approve or disapprove the transformation under § 35-1-823, MCA.
2. They were entitled to vote to approve or disapprove the transaction under § 19C of the Bylaws.
3. They were entitled to dissenter rights, including the opportunity to receive "fair value" for their shares as of the date of the sale under § 35-1-827, *et seq.*, MCA.

Montana Power Company did not give the shareholders their statutorily required and contractually required right to vote on the sale of power assets and transformation of Montana Power Company nor were they given an opportunity to exercise their statutory dissenter rights or payment of fair value.

On August 16, 2001, the shareholders of the Montana Power Company brought an action to enforce the rights and remedies above-described. On August 1, 2002, the district court issued the following conclusions of law concerning the shareholders' case against the Montana Power Company:

3. The purpose of Section 35-1-823, M.C.A., is to protect the shareholders from the destruction of the means to accomplish the purpose for which the corporation was incorporated and to protect the shareholders from a disposition of operational assets which fundamentally alters the character of their investment.
4. Section 35-1-823, M.C.A., must be construed to give effect to the purpose of the statute.

5. Section 35-1-823, M.C.A., must be followed whenever a corporation determines or proposes to sell or dispose of all or substantially all of the assets necessary to fulfill the corporate purposes. This requirement is mandated regardless of the number of buyers or number of transactions utilized to accomplish such a selling or disposition.

6. A duty is created, and a right enforceable by, the shareholders of the corporation through Section 35-1-823, M.C.A. A claim based on this statute is a direct claim and is not derivative of the corporation's rights.

Order at p. 2.

Following the initiation of this lawsuit the Montana Power Company was merged into Montana Power, L.L.C., the surviving entity, in a merger transaction illustrated and described in Exhibit "A" attached hereto.

With respect to this reorganization the following facts are key:

1. The merger required the agreement of Montana Power Company shareholders which was obtained upon the representation and assurance in the proxy/prospectus document<sup>1</sup> that the "Effect of Restructuring" would be the operation of law pursuant to § 35-1-817 and § 35-8-1203, which statutes provide that the surviving entity has all the liabilities of the merging entities and that any proceeding pending against a merging entity [*e.g.*, MPC] could be "continued as if the merger did not occur."

2. The Articles of Merger attached hereto as Exhibit "B" is the charter which creates the successor entity:

Adopt the following Articles of Merger for the purpose of merging the Montana Power Company with and into Montana Power, L.L.C which shall be the surviving entity.

The next step for the Montana Power Company (now "Montana Power, L.L.C.") was transfer of this company's ownership to NorthWestern Corporation. This transfer was accomplished by sale of the single partnership "unit" in a Unit Purchase Agreement. Under this contract, which also required approval of the Montana Power Company shareholders, NorthWestern Corporation agreed with Touch America Holdings, Inc. that Touch America would indemnify NorthWestern for certain liabilities that came with the corporation. These

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<sup>1</sup>See Exhibit "T".

included certain litigation identified in Schedule 10.05. The shareholder lawsuit was not among the liabilities which Touch America would assume under such indemnity agreement.

Recognizing that the shareholder lawsuit came with Montana Power, NorthWestern asked Touch America to add the shareholder lawsuit to Schedule 10.05 but Touch America refused. With full knowledge that the shareholder lawsuit came with Montana Power and with full knowledge that Touch America refused to indemnify for any losses arising out of such lawsuit, NorthWestern thereafter agreed to complete the transaction in February of 2002.

One reason that the sale to NorthWestern was structured as a transfer of ownership of Montana Power as opposed to a sale of assets (*e.g.*, "poles and wires") was that a sale of assets would result in profits which would have to be shared with the ratepayers. Thus, when seeking approval of the Montana Public Service Commission the companies argued that there was no profit since the transaction was simply a transfer of ownership such that Montana Power would continue as it always had.

Key facts to this sale transaction included the following:

1. Since the sale was a transfer of ownership, it had no effect on the shareholder lawsuit against Montana Power.

2. Under the terms of the agreement, Touch America would not indemnify NorthWestern for losses sustained by Montana Power in the shareholder lawsuit.

3. Upon completion of the sale NorthWestern filed with the Secretary of State its "Election to Continue Business" of Montana Power:

Touch America . . . sold its entire interest in and dissociated from Montana Power, L.L.C. . . .

NorthWestern Corporation as sole remaining [owner] hereby elects to continue the business of the Montana Power, L.L.C.

*See* Exhibit "C" (emphasis added).

The next event occurred on March 19, 2002, when the company filed with the Secretary of State Articles of Amendment for Name Change whereby the Montana Power, L.L.C. was simply renamed NorthWestern Energy, L.L.C. *See* Exhibit "D."

Since the merger, transfer of ownership and name change, the company has continued to be operated as the successor to Montana Power. For example, attached as Exhibit "E" is the company's filing with the Security and Exchange Commission identifying itself as "formerly known as The Montana Power, L.L.C.. and successor by merger to the Montana Power Company." Exhibit "F" is a complaint in a lawsuit filed by the company identifying itself as "formerly known as The Montana Power, L.L.C. . . . the successor to seller [the Montana Power Company]."

In the McGreevey lawsuit, the company continued as defendant by operation of Rule 25(c), M.R.Civ.P./F.R.Civ.P., and §§ 35-1-817 and 35-8-1203, MCA<sup>2</sup>:

An action or proceeding pending by or against a limited liability company or other entity that is a party to a merger may be continued as if the merger had not occurred or the surviving entity may be substituted as a party to the action or proceeding.

However, in November of 2002, NorthWestern Corporation (the parent) sought to upstream the assets of the former Montana Power Company (renamed "NorthWestern Energy, L.L.C."). Because such a transfer would leave the defendant in this litigation unable to meet its obligations under the claims in this lawsuit, the Montana District Court ordered that no such transfer could be done without assurance that equivalent assets would be available to satisfy any judgment obtained by the shareholders. Attached as Exhibit "G" is the District Court order.

In order to satisfy the conditions of the Court, NorthWestern Corporation entered into yet another agreement with the former shareholders of the Montana Power Company by way of stipulation, recited in NorthWestern's Substitute Motion for Leave to Add NorthWestern Corporation as an Additional Party-Defendant:

NOR desires to proceed with the restructuring and reorganization of the assets . . . As a result of such reorganization, substantially all of the assets and liabilities of the Remaining Utility Business will be transferred to NOR.

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<sup>2</sup>Pursuant to those statutes and rule the State District Court held that NorthWestern Energy, L.L.C. is a legal successor to the defendant Montana Power Company (see Exhibit "G").

7. In order to give effect to the Court's Order of October 23, 2002, NWE requests and NOR stipulates and represents to this Court that NOR may be added as an additional party-defendant to these proceedings subject to the personal jurisdiction of this Court. NOR further stipulates and represents to this Court that it will be responsible for any judgment which might be entered in these proceedings against NWE to the extent that NWE might not have sufficient assets to satisfy such judgment and that NOR is subject to the procedures for all forms of pre- and post-judgment relief and execution procedures under applicable Montana law.

\* \* \*

9. NOR further stipulates and represents to the Court it will not take any action intentionally designed to frustrate the ability of Plaintiffs to obtain the utility business assets if there is a judgment entered in this case.

\* \* \*

11. Based on these understandings and stipulations, Plaintiffs' counsel have been contacted and state that they have no objection to the addition of NOR on the basis described above and that Plaintiffs' counsel agree that the transfer described satisfies the requirements of the Court's October 23, 2002 and November 4, 2002 Orders.

See Exhibit "H" attached hereto.

#### **LEGISLATIVE HISTORY OF SENATE BILL 458.**

At the request of NorthWestern Corporation, Senate Bill 458 was introduced before the Montana Legislature. The bill, as originally introduced<sup>3</sup>, would have profoundly changed the law of successor liability of corporate and limited liability entities. In its original form, the bill would have amended § 35-1-817 and § 35-8-1203, MCA,<sup>4</sup> such that any corporation which underwent a reverse triangular merger could leave behind its liabilities. Section 2 and Section 3 to original Senate Bill 458 thus provided that "the liabilities resulting from, related to or arising out of a reorganization, restructuring, or plan of merger become the sole liabilities of the corporation in which the shareholders have an ownership interest after the

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<sup>3</sup>Attached as Appendix 1 is the official bill showing the original language and all amendments. Appendix 2 shows S.B. 458 in final form.

<sup>4</sup>§§ 35-1-817 and 35-8-1203, MCA, are the very successor liability statutes expressly referenced in the representations in the proxy presented to the shareholders to secure their approval of the reorganization and transfer of Montana Power.