

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

IN THE MATTER of the Complaint of )  
SHOSHONE CONDOMINIUM HOTEL )  
OWNERS ASSOCIATION, a Montana )  
Corporation, )

Complainant, )

v. )

ABACO ENERGY SERVICES, )  
LLC, a North Dakota Limited Company, )

Defendant. )

REGULATORY DIVISION

DOCKET NO. D2013.9.71

**MOTION AND BRIEF IN SUPPORT  
OF MOTION TO DISMISS**

**INTRODUCTION**

This docket is a complaint proceeding instituted by the Shoshone Condominium Hotel Owners Association ("Association"). In mid-October, ABACO Energy Services, LLC ("ABACO"), received from the Commission a Notice of Complaint issued in this docket, with a direction to respond. Attached to the Notice was a copy of the Complaint submitted to the Commission by the Association. It indicates on its face that it has been filed against not only ABACO, but Boyne USA, the owner of the Big Sky Ski Resort. Complaint at p. 1.

ABACO appears before the Commission in this proceeding for the sole purpose of obtaining an order of the Commission dismissing the Complaint for lack of jurisdiction, power, or authority over ABACO, or the subject matter of the Complaint. Specifically, ABACO is not a public utility as defined in Chapter 3 of Title 69 of the Montana Code Annotated ("MCA"), and the Commission has no jurisdiction, power, or authority over it.

Therefore, ABACO respectfully moves the Commission for issuance of an order dismissing the Complaint in this docket as being outside of the jurisdiction of the Commission.

ABACO integrates with its motion its brief in support of the motion. It also files concurrently with its motion and brief the affidavit of Mr. Stacy L. Tschider ("Tschider Aff.").

### FACTS

This Commission regulates public utilities under Chapter 3 of Title 69, MCA. The delivery and sale of propane in Montana is not a public utility service, and is not regulated by the Commission. The propane delivery system at the Big Sky Ski Resort has been owned and operated by three different entities for almost eighteen years: (1) The Montana Power Company ("MPC"); (2) NorthWestern Energy ("NWE"); and (3) ABACO. Even though MPC was a regulated utility, and NWE is a regulated utility, the propane delivery system at the Big Sky Ski Resort has always been understood NOT to be a utility operation subject to regulation by the Commission. Attached to this Brief as Exhibit 1 is a copy of page 221 of The Montana Power Company's 1997 FERC Form No. 1 in which the propane delivery system at the Big Sky Ski Resort is expressly identified as: "Nonutility property never devoted to public service."<sup>1</sup>

The construction and operation of the propane delivery system at the Big Sky Ski Resort arose under a contractual agreement between Boyne USA, and the now defunct Montana Power Company. Tschider Aff. at ¶s 2 & 6. It became the property of NWE when it acquired MPC in 2002. *Id.* The system consists of two buried propane tanks, approximately 19,500 feet of plastic pipe, and vaporizers which inject the propane into the pipe for delivery to multiple locations within the ski resort. Tschider Aff. at ¶ 3. The propane tanks, piping, and associated facilities are all located on the property of the ski resort owner, Boyne USA. *Id.* The system is an alternative to having multiple above ground propane storage tanks in the resort. *Id.* Instead of a different local propane supplier delivering propane to above ground storage tanks

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<sup>1</sup> The Commission routinely receives the FERC forms from its jurisdictional utilities.

by truck, ABACO delivers propane to its customers in the Big Sky Ski Resort using its buried system.

With one exception, no property owner within the ski resort is required to purchase propane from ABACO. Tschider Aff. at ¶¶ 4. The Company has no franchise to serve the Big Sky Ski Resort with propane, and individual property owners are free to install their own propane storage tanks and buy propane from whatever supplier they choose. *Id.*

The one exception is Boyne USA, the owner of the ski resort. Tschider Aff. at ¶¶ 5. In order to induce what was then the Montana Power Company to build and operate the propane delivery system, Boyne USA agreed to purchase certain minimum volumes of propane for a contractually specified period of time. *Id.* At the end of the contract period, the contract vests in Boyne USA the right to purchase the propane delivery system. *Id.*

ABACO does not sell propane to the Association, the complainant in this proceeding. Tschider Aff. at ¶¶ 7. Although it delivers propane at that location as part of its agreement with Boyne USA, it is Boyne which is its customer. *Id.* The Complaint submitted by the Association in this docket frankly acknowledges it is not one of ABACO's customers:

Boyne USA, Inc. And ABACO have entered into a written agreement to provide propane service dated July 25, 2007. Boyne, after purchasing propane sells the propane to Shoshone to be used to heat the Shoshone Condominium Hotel located at Big Sky, Montana.

Complaint at p. 2. That is why the Association has also named Boyne USA in its Complaint.

ABACO acquired the propane delivery system located at the Big Sky Ski Resort from NWE in 2007. Tschider Aff. at ¶¶ 2. The system was never part of NWE's or MPC's utility operations in Montana. From its inception, it was a private business arrangement with Boyne USA, the owner of the ski resort. *Id.*

## ARGUMENT

### The Commission Must Dismiss The Complaint Of The Association For Lack Of Jurisdiction.

The Commission must dismiss the complaint of the Association for lack of jurisdiction. ABACO is not, and never has been, a public utility. The Commission's enabling legislation defines the term "public utility" for purposes establishing the parameters of its jurisdiction:

69-3-101. Meaning of term "public utility". (1) 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:

- (a) heat;
- (b) street-railway service;
- (c) light;
- (d) power in any form or by any agency;
- (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;
- (f) regulated telecommunications service.

Section 69-3-102, MCA. The sale and delivery of propane is not defined as a public utility function.

Although the Association may argue that burning propane produces heat, that cannot possibly be the basis for an assertion of Commission jurisdiction over ABACO. If it were, every propane supplier in the State of Montana would, over night, suddenly become a public utility, as well as every seller of gasoline or diesel fuel.

The simple fact of the matter is that the Montana legislature was entitled to, and did, enact a restrictive definition of what is and is not a public utility.

It is idle to cite authorities defining the terms “public utilities,” as those terms are generally understood in common parlance. For the purpose of indicating the extent to which the state should then go in exercising its regulatory powers over public utilities it was competent for the Montana legislature to adopt such a restricted definition of those terms as it saw fit, and it saw fit to adopt the definition contained in section 3 above and to limit the jurisdiction of the Public Service Commission to the specific subjects therein enumerated. There is not any mention in section 3 of a corporation, company, association or individual engaged in furnishing water for irrigation purposes, and the only contention made, or that could be made, is that the expression “water for business” comprehends water for irrigation. In view of the fact that irrigation has been one of the most prominent subjects of legislation and general consideration by the people in Montana from its organization as a territory in 1864 to the present time, it would impeach the intelligence of every member of the legislative assembly of 1913 to say that in enacting Chapter 52 above, the members could not command language to express the idea of irrigation but were driven to the sorry expedient of using the phrase “water for business” as the best expression available to represent the idea.

*State ex re Thatcher v. Boyle*, 62 Mont. 97, 102-103, 204 P. 378 (1921). Equally clear is the fact that the Association’s desire to have the Commission regulate ABACO as if it were a public utility is irrelevant.

Part of the concept of a public utility is the profession of a willingness to serve the general public. A contractual arrangement to provide limited service is not a profession of public utility service, and does not constitute the provider a public utility. *Lockwood Water Users Association v. Anderson*, 168 Mont. 303, 542 P. 2d 1217 (1975). ABACO has not professed to serve the public.<sup>2</sup> It is fulfilling its contractual obligations to Boyne USA. Indeed, at the end of the contract term, Boyne USA has the right to terminate ABACO’s entire business

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<sup>2</sup> ABACO has a modest number of customers other than Boyne USA. However, it has not held itself out as the provider of propane throughout the Big Sky Ski Resort. It does not have the power or right to make such an assertion.

in the Big Sky Ski Resort by purchasing the system, which is located on the private property of Boyne USA.

**CONCLUSION**

The Association's Complaint must be dismissed for lack of jurisdiction. The Commission has no jurisdiction, power, or authority over ABACO. It only has jurisdiction over a public utility as defined in the Commission's enabling legislation.

DATED this 12<sup>th</sup> day of November 2013.

**HUGHES, KELLNER, SULLIVAN & ALKE, PLLP**

By John Alke  
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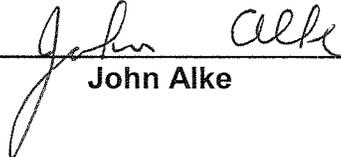
**Attorneys for ABACO Energy Services**

**CERTIFICATE OF SERVICE BY MAIL**

I HEREBY CERTIFY that a copy of the foregoing **MOTION AND BRIEF IN SUPPORT OF MOTION TO DISMISS** was served upon the following by mailing a true and correct copy thereof on this 12<sup>th</sup> day of November 2013, addressed as follows:

**ROBERT A NELSON  
MONTANA CONSUMER COUNSEL  
PO BOX 201703  
HELENA MT 59620-1703**

**J ROBERT PLANALP  
LANDOE BROWN PLANALP & REIDA PC  
27 N TRACY  
PO BOX 1  
BOZEMAN MT 59771-0001**

  
\_\_\_\_\_  
John Alke

**NONUTILITY PROPERTY (Account 121)**

1. Give a brief description and state the location of non-utility property included in Account 121.

2. Designate with a double asterisk any property which is leased to another company. State name of lessee and whether lessee is an associated company.

3. Furnish particulars ( details ) concerning sales, purchases, or transfers of Nonutility Property during the year.

4. List separately all property previously devoted to public service and give date of transfer to Account 121, Nonutility Property.

5. Minor Items ( 5% of the Balance at the End of the Year), for Account 121 or \$100,000, whichever is less) may be grouped by (1) previously devoted to public service(line 44), or(2) other nonutility property (line 45).

Line No.	Description and Location (a)	Balance of Beginning of Year (b)	Purchases, Sales, Transfers, etc. (c)	Balance at End of Year (d)
1	NONUTILITY PROPERTY PREVIOUSLY DEVOTED TO PUBLIC SERVICE:			
2				
3				
4	Fish Creek Hydro Power Site Lands			
5	Fish Creek, Alberton, MT			
6	(Above land was transferred to account 121 in 1945 in conformity with FERC order)			
7		513,712	28,136	541,848
8				
9	NONUTILITY PROPERTY NEVER DEVOTED TO PUBLIC SERVICE:			
10				
11	Morony Camp Land			
12	Great Falls, MT			
13	(Purchased in 1996)			
14		531,182	20,273	551,455
15	Big Sky Mountain Village			
16	Propane Storage Tank and Distribution System			
17	Big Sky, MT			
18	(Constructed 1996)			
19		328,156	16,332	344,488
20	Hawthorne Park Substation Lands			
21	Billings, MT			
22	(Transferred to account 121 in 1989)			
23		201,720		201,720
24	Miller Creek Lands			
25	Miller Creek, MT			
26	(Purchased in 1986)			
27		169,919		169,919
28	Anaconda Job Corps			
29	Propane Storage Tank and Distribution System			
30	Anaconda, MT			
31	(Constructed 1996)			
32		119,086		119,086
33				
34				
35				
36				
37				
38				
39				
40				
41				
42				
43				
44	Minor Item Previously Devoted to Public Service	56,278		56,278
45	Minor Items-Other Nonutility Property	340,156	(6,662)	333,494
46	TOTAL	\$2,260,209	\$58,079	\$2,318,288

