

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

IN THE MATTER of the Complaint of)	REGULATORY DIVISION
SHOSHONE CONDOMINIUM HOTEL)	
OWNERS ASSOCIATION, a Montana)	
Corporation,)	
)	
Complainant,)	DOCKET NO. D2013.9.71
)	
v.)	
)	
ABACO ENERGY SERVICES,)	REPLY BRIEF ON MOTION TO DISMISS
LLC, a North Dakota Limited Company,)	(ORAL ARGUMENT REQUESTED)
)	
Defendant.)	

INTRODUCTION

The Complainant in this matter, The Shoshone Condominium Hotel Owners Association (“HOA”), has filed a complaint with the Commission against both Boyne, USA (“Boyne”), the owner of the Big Sky Ski Resort, and Abaco Energy Services (“ABACO”), which sells and delivers propane to Boyne at the Shoshone Condominium Hotel. The Complaint filed by the HOA frankly admits that it does not have a customer relationship with ABACO, and is receiving propane from Boyne:

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.

The HOA essentially alleges that the sale and delivery of propane is a utility service, and demands that the Commission establish the price at which the HOA will receive propane from Boyne:

It is requested that The Montana Public Service Commission investigate and thereafter fairly regulate the price of propane provided by ABACO to the propane tank farm and from it to the boiler house that is dedicated to the generation of heat and utility service for the benefit of a Shoshone property.

Complaint at p. 3. Although the above quoted HOA demand for relief references ABACO, the requested relief can only be applied to Boyne, as the HOA is receiving propane from Boyne, not ABACO. That is why the body of the HOA Complaint specifically indicates it is against both Boyne, and ABACO. Complaint at p. 1.

The HOA is made up of the owners of individual condominium units within the Shoshone Hotel, called "unit owners," Section 70-23-101(17), MCA. Each unit owner has an undividable interest in the common elements of the condominium, such as the overall structure, Section 70-23-403, MCA. Every condominium must have a manager as defined in Section 70-23-102(10). The HOA Complaint is silent as to the identity of the manager for the Shoshone Hotel, or the relationship of that manager to Boyne.

The Commission's authority to entertain complaints is necessarily limited to its authority to regulate public utilities. *State ex rel Public Service Commission v. District Court*, 107 Mont. 240, 242, 84 P. 2d. 335 (1938). It has been specifically denied judicial powers, Section 69-3-103(1), MCA. It does not have authority to adjudicate disputes between the HOA and Boyne, or set the price at which Boyne must provide propane to the Shoshone Hotel.

ABACO has appeared before this Commission for the sole purpose of obtaining an order dismissing the HOA complaint against it for lack of jurisdiction. The HOA has filed a response which urges the Commission to defer ruling on the motion until after the HOA has had an opportunity to conduct discovery. The HOA response reveals the real purpose behind the filing of its Complaint. The HOA wants to use the Commission as a forum for discovery in its dispute with Boyne.

ARGUMENT

I. The Commission does not have jurisdiction over the sale and delivery of propane in Montana.

The Commission does not have jurisdiction over the sale and delivery of propane in Montana. If it did, propane companies such as Northern Energy, Montana Propane, or Amerigas would be subject to regulation by the Commission.¹ Using the argument of the HOA in this proceeding, such companies “own, operate, or control” “plant and equipment” (trucks and propane tanks) which provide “heat or light” (propane). The only difference between these companies and ABACO is the manner in which they deliver the propane to their customers.

A distinguishing feature of a public utility is the existence of some level of monopoly power.

Nevertheless, two attributes of a public utility business have received emphasis in the textbooks, and they will be discussed in turn. The first is the special public importance or necessity of the types of service supplied by utility enterprises; the second is the possession by utility plants of technical characteristics leading almost inevitably to monopoly or at least to ineffective forms of competition. As Clemens neatly puts it: “Necessity and monopoly are almost prerequisites of public utility status.”

Bonbright, *Principles of Public Utility Rates*, Columbia University Press, 1961. The source of such power is typically a franchise provided by local government in return for a commitment to serve the citizens of the granting authority. Under Montana law, an incorporated city can provide an entity holding itself out as a public utility the right to lay utility mains in city streets,

¹ The Commission can take judicial notice that these companies are advertising their propane sale and delivery services in the yellow pages for Bozeman and Helena. Section 2-4-612(6), MCA, M.R. Ev. 201.

Section 7-3-4101, MCA.² An incorporated city can also grant a franchise to serve its citizens. Sections 7-1-4123(8), and 7-5-4321, MCA. Big Sky is a ski resort, not an incorporated city.³

The sale and delivery of propane cannot be successfully described as having the characteristics of a monopoly. Propane is ubiquitously available not only from dedicated propane companies like Northern Energy, Montana Propane and Amerigas, but numerous retail outlets such as grocery stores, drug stores, and hardware stores.

As indicated by the HOA in its Response Brief, there are public utilities in Montana which sell and deliver propane. However, their status as public utilities is not determined by the fact they sell and deliver propane, but the fact they held themselves out as public utilities to gain the advantage of that status; the right to use city right of way for laying pipe, and franchise rights to serve specific communities. The propane delivery systems constructed and owned by the Montana Power Company, then NorthWestern, provide a classic case in point.

The Montana Power Company built three propane delivery systems in the 1995-1996 time frame, including the system at the Big Sky Ski Resort. It also constructed propane delivery systems to serve the residents of Townsend, Montana, and the Job Corp outside of Anaconda. The system serving Townsend, Montana was held out as a public utility because it needed access to city right of way to reach its customers.⁴ Accordingly, MPC submitted its Townsend propane delivery to regulation by the Commission as a public utility in return for

² The statute is entitled "Authority to permit laying of utility mains." The Montana Supreme Court has specifically held that a city can authorize the use of its right of way "only for the benefit of the general public." *Nord v. Butte Water Company*, 96 Mont, 311, 320, 30 P2. 809. In other words, certain businesses must be willing to submit to regulation as a public utility in order to lay pipes in city right of way.

³ See e.g. http://ballotpedia.org/Cities_in_Montana.

⁴ MPC may have also obtained a franchise to serve Townsend.

obtaining access to city right of way. The propane delivery systems it constructed for the Job Corp near Anaconda and the Big Sky Ski Resort were never held out as public utilities, as they did not serve the public under franchise agreements, and were not held out as public utilities for purposes of obtaining access to city right of way.

ABACO's propane delivery system at the Big Sky Ski Resort has never been held out as a public utility. ABACO has no franchise agreement to serve the Big Sky Resort. Its distribution system is located on the private property of Boyne, and Boyne has a right to purchase the system at the expiration of the contract term. With the exception of Boyne, ABACO's customers are free to change propane suppliers at any time.

The HOA may argue that the unit owners within the Shoshone Hotel can't install their own propane tanks. If true, that is not because of anything ABACO has done. Any such limitation would be a result of either the declaration of unit ownership for the Shoshone Hotel required by Section 70-23-301, MCA, or the actions of the manager of the condominium.

The Commission does not have jurisdiction to hear the HOA complaint against ABACO, as it does not have jurisdiction over the sale and delivery of propane in Montana.

II. The Montana Rules of Civil Procedure Do Not Apply To The Commission

The Montana Rules of Civil Procedure do not apply to the Commission. By their express terms, they only apply to proceedings conducted by the District Courts of the State of Montana: "These rules govern the rules of procedure in the district courts of the state of Montana...." M.R. Civ P. 1. Despite the inapplicability of the Montana Rules of Civil Procedure to this proceeding, the HOA complains bitterly that ABACO has violated the Montana Rules of Civil Procedure by supporting its Motion to Dismiss with the sworn affidavit of Mr. Stacy Tschider. Response Brief at pp. 7-9.

The Montana Supreme Court has held that the Commission may use the Montana Rules of Civil Procedure as “guidance” in its proceedings. *Citizens Awareness v. Montana Board of Environmental Review*, 2010 MT 10, ¶¶19, 355 Mont. 60, 67, 227 P. 3d 583, *Williamson v. Montana Public Service Commission*, 2012 MT 32, ¶¶ 33, 364 Mont. 128, 143, 272 P. 3d. 71. The Commission should decline to apply the Montana Rules of Civil Procedure as suggested by the HOA in this case, as it would inexorably lead to the misuse of Commission proceedings for purposes of conducting discovery against companies like ABACO and Boyne, which are not subject to the jurisdiction of the Commission.

In essence, the HOA contends that by merely alleging that ABACO is a regulated public utility in a complaint filed with the Commission, the HOA is entitled to discovery relating to its dispute with Boyne and ABACO. However, since the Commission is not a court of general jurisdiction, like the Montana District Courts, the Commission can only impose a discovery requirement against a Commission regulated utility or party which voluntarily submitted to Commission jurisdiction.⁵ Phrased another way, the Commission must first determine whether ABACO and Boyne are subject to its jurisdiction before it can require either company to submit to discovery in this proceeding. Moreover, the extent of the Commission’s jurisdiction in this case is primarily a legal question, not a factual question.

The Montana Rules of Civil Procedure do not apply to Commission proceedings. The Commission should decline to apply those rules as suggested by the HOA in this case.

⁵ The Intervenors in a Commission rate case have voluntarily submitted to Commission jurisdiction for purpose of discovery.

III. Affidavits May Be Used To Support a Motion To Dismiss For Lack of Subject Matter Jurisdiction.

Even if the Commission decided to use the Montana Rules of Civil Procedure as guidance in this case, the law is clear that under those rules, an affidavit may be used to support a motion to dismiss for lack of subject matter jurisdiction. As well stated in Wright and Miller, *Federal Practice and Procedure*, § 1350, Vol. 5B, pp.159-160:

When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other additional matter to support the motion. Conversely, the pleader may establish the actual existence of subject matter jurisdiction through extra-pleading material. The note below contains citations to a wide array of cases from the four corners of the federal judicial system involving the district court's broad discretion to consider relevant and competent evidence on a motion to dismiss for lack of subject matter jurisdiction to resolve factual issues.

ABACO has moved to dismiss the HOA complaint on the clearly stated grounds that the Commission has no jurisdiction over the matters alleged in the HOA complaint, the equivalent of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of either the Montana Rules of Civil Procedure, or the Federal Rules of Civil Procedure. The HOA assertion that ABACO cannot use the affidavit of Stacy Tschider to support that motion under the rules of civil procedure is simply wrong.

IV. Gallatin Natural Gas Company v. Public Service Commission Does Not Support The Position Of The HOA In This Docket.

The HOA relies heavily on the Montana Supreme Court's decision in *Gallatin Natural Gas Company v. Public Service Commission*, 79 Mont. 269, 256 P. 373 (1927) as support for its position in this case. That decision provides no support, of any kind, for the position of the HOA. The issue in that case has nothing to do with the question before the Commission in this case - whether the Commission has authority over the sale and delivery of propane in Montana.

The issue in the *Gallatin Natural Gas Company* case was whether the Commission could treat an upstream parent of regulated gas utility as the utility itself, based upon the unique facts of the case. The Billings Gas Company was the local gas distribution utility in the Billings area. It had obtained from the City of Billings a franchise to serve gas in the City, as well as the right to use City right of way to lay its gas mains.⁶ When the Commission was established in 1913, Billings Gas Company submitted itself to the jurisdiction of the Commission.⁷ The Billings Gas Company was wholly owned by the Gallatin Natural Gas Company, and obtained all of the gas it sold in Billings from its upstream parent. *Gallatin Natural Gas Co.* at p. 276. The Billings Gas Company provided to its upstream parent forty percent of its gross retail sales revenues as payment for the gas provided by its upstream parent. *Id.*

The Montana Supreme Court clearly framed the issue in the case:

The vital question upon this appeal is: Are plaintiff and [1] the Billings Gas Company, in effect and in law, one and the same; or, in other words and in the words of the statute (sex. 3881, supra), does plaintiff own, operate or control the plant or equipment of the Billings Gas Company for the delivery of or for furnishing, for or to other persons, heat, light or power?

Gallatin Natural Gas Company at p. 279. It noted that the lawyers for the Billings Gas Company and the Gallatin Natural Gas Company specifically represented to the Commission that the two companies “are the same thing”. *Id.* at pp. 281-282. Not surprisingly, the Court held that it could pierce the corporate veil and treat the two companies as one and the same entity. *Id.* at pp. 286-289.

The *Gallatin Natural Gas Company* case provides no support for the HOA argument that the Commission has jurisdiction over the sale and delivery of propane in the state of Montana.

⁶ See *State ex rel Billings v. Billings Gas Co*, 55 Mont. 102, pp 106-107, 173 P. 799 (1918).

⁷ *Id.*

Nor does it offer support for the HOA argument that the Commission should defer ruling on ABACO's Motion to Dismiss to allow the HOA to conduct discovery.

CONCLUSION

The Commission must issue an order dismissing the HOA Complaint in this docket. It does not have jurisdiction over the sale and delivery of propane in Montana. ABACO is not a public utility as defined in Section 69-3-101, MCA.

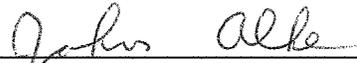
REQUEST FOR ORAL ARGUMENT

ABACO respectfully requests oral argument before the Commission on its Motion to Dismiss.

DATED this 10th day of January 2014.

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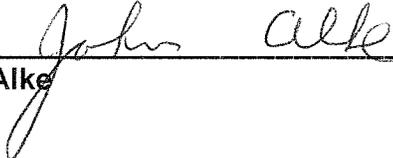
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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing **REPLY BRIEF ON MOTION TO DISMISS** was served upon the following by mailing a true and correct copy thereof on this 10th day of January 2014, addressed as follows:

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