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CONDOMINIUM HOTEL OWNERS ASSOCIATION

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

SHOSHONE CONDOMINIUM HOTEL OWNERS ASSOCIATION, a Montana Corporation, Petitioner, ABACO ENERGY SERVICES, LLC, a North Dakota Limited Company, Respondent.	)	**DOCKET NO: D2013.9.71** **SHOSHONE CONDOMINIUM HOTEL OWNERS ASSOCIATION'S REPLY BRIEF IN SUPPORT OF REGULATION**

The arguments raised by ABACO in its Opposition Brief were all addressed by the Shoshone Condominium Hotel Owners Association ("SCHOA") in its initial brief. SCHOA in this brief will point out from the record evidence that contradicts ABACO's arguments. Additionally, it is important to note Boyne USA did not file a brief opposing or disagreeing with the arguments stated in SCHOA's brief.

1) SCHOA AND THE UNIT OWNERS ARE CUSTOMERS OF ABACO

Murray Morgan testified that SCHOA gets the bill that ABACO sends to Boyne. The numbers that are on the ABACO bill are the same numbers that are on the Boyne bill that creates

the pass through dollar for dollar. SCHOA then pays a portion of that bill. (Hearing TR p. 83.) SCHOA is a customer of ABACO. Murray Morgan testified the SCHOA understands "Customer" to mean a buyer, patron or shopper. See Random House Dictionary of the English Language. One who regularly or repeatedly makes purchases of or has dealings with a tradesman or business house. Blacks Law Dictionary p. 7. (Direct Testimony of Murray Morgan p. 2). Boyne has admitted that it does not sell propane so SCHOA is ABACO's Customer.

ABACO knew that SCHOA was its customer. It wrote a letter to the Shoshone Board and Unit Owners on September 28, 2012. That letter was throughly discussed in SCHOA's Opening Brief. This letter clearly indicates ABACO knew SCHOA was using ABACO's propane and paying for ABACO's propane.

Introduced in Direct Testimony of Murray Morgan is Ex. 1-2 which is a copy of an invoice billed by ABACO for service at the "Shoshone Lodge propane meter" that invoice is dated July 1, 2009 and shows usage of 13,710 gallons at a unit price of $1.41 per gallon. The bill is ABACO's. It does not say "Boyne meter" it says Shoshone Lodge. This bill acknowledges ABACO knew SCHOA was using its propane. Barb Rooney testified that it was understood that between Boyne and ABACO what buildings were being served by propane being delivered to the meters in those buildings. Hearing TR p. 175.

The various unit owners makeup the SCHOA. Murray Morgan testified that the SCHOA is made up of the unit owners of the Shoshone Condominium Hotel. The members own the SCHOA. (Direct Testimony of Murray Morgan p.3.)

Murray Morgan testified that the arrangement with ABACO is no different than with Northwest Electric that has a single meter for electricity. Boyne and SCHOA split the electrical

costs similar to the split for propane. (Hearing TR p. 54) When Boyne bills SCHOA, it provides ABACO's bill so SCHOA can see what ABACO is charging and in turn what SCHOA is paying as a portion of that bill. (Hearing TR p. 54) As to the contract between Boyne and ABACO, Mr. Morgan testified that SCHOA asked Barb to provide the contract and she maintained Boyne could not provide it. (Hearing TR p. 61) Murray Morgan testified that similar to Northwest Electric SCHOA is a customer of ABACO. (Hearing TR p. 62 line 11.)

Barb Rooney was quite clear that there is no financial benefit to Boyne in the pass through of the propane costs from ABACO to SCHOA. (Hearing TR p. 187 line 5-19).

The above evidence together with the evidence described in SCHOA's Opening Brief clearly shows that there is no intervening agency or instrumentality between ABACO and SCHOA. Alternatively there is a close logical or consequential relationship between SCHOA and ABACO. Lastly, the "pass through" analysis by the Montana Supreme Court in Williamson v, Montana Public Service Commission 212 MT 32 364 Mont 128, 272 P.3d 71 allows this Commission to rule that SCHOA and its Unit Owners have standing to seek regulation.

2) THERE ARE NO INTERVENING ACTORS BETWEEN ABACO AND SCHOA

Boyne has repeatedly stated it does not sell or deliver propane to the SCHOA. The propane is delivered from ABACO's tank farm through ABACO's piping system to a meter owned by ABOCO to boilers owned by SCHOA and operated by Boyne under a management contract. In that sense the SCHOA receives its propane directly from ABACO. (Direct Testimony of Murray Morgan p. 6-7)

Moreover there was introduced SCHOA's Response to PSC Data Request No.17. It asked about Shoshone's agreement to provide propane service to its members. The SCHOA's

response was that it does not provide propane services to Unit Owners. The propane is converted at the SCHOA's boiler to heat and the heat is provided to Unit Owners by its members. There is a very small amount of propane that goes to each unit to light fireplaces.

Mr. Orsello clearly stated that he believes that the one who owns the distribution system, being ABACO, is the true utility provider. (Hearing TR p. 132-125) Further he testified that the ABACO contract contemplated ABACO adding customers because the contract provided in part, that if ABACO chose to add customers, Boyne would give additional easements and rights to add more pipe. Mr. Orsello testified that looked like a person that wanted to be a utility. (Hearing TR p. 132 line 23- p. 133)

Murray Morgan testified Boyne is not a public utility.

Boyne operates the Shoshone boilers for and on behalf of SCHOA. Boyne doesn't own any of the infrastructure. They don't own any of the resources. Basically Boyne is a bill to- party who then takes, whether it is electric or propane, Boyne divides it out and says this is SCHOA's portion of it. (Hearing TR p. 70 line 5-1)

The SCHOA is not an intervening actor. It is owned by the members. Members who are Unit Owners. (Direct Testimony Murray Morgan p.3) Essentially the Members are SCHOA. The ultimate user is the SCHOA. The SCHOA uses propane to; (1) heat the Shoshone pool; (2) heat its domestic water to each unit; (3) preheat outside air during the heating months to replace circulation loss; and (4) provide a base heat source to the heat pump located in each unit during the heating months. A very small quantity of propane is also used to light the fireplaces in each individual unit. (Murray Morgan Direct Testimony p.4)

The SCHOA obtains its propane from ABACO. "Obtain" means to get hold of by effort; to get possession of. See Blacks Law Dictionary. Utilizing the physical element of possession, SCHOA maintains that the propane is ABACOs as it is supplied by ABACO to ABACO's tank farm and delivered to the Shoshone boiler in the ABACO piping system. If there was a leak or a defect in any part of ABACO's piping structure ABACO would be responsible for repairing the defect as it is charging for operation and maintenance. It appears the propane is ABACOs until it is delivered to the Shoshone boiler. (Direct Testimony Murray Morgan p.6)

Consequently, there are no intervening agents or layers of transactions between ABACO and SCHOA. To the contrary Mr. Tschider's letter of September 28, 2012 is most revealing. In it he writes:

> The purpose of this letter is to give you the list of ABACO Energy Services (ABACO) members and to provide you with an overview of the systems and services we provide as your propane distribution company. (emphasis supplied)

See Ex. 1-6 His letter negates any argument there are intervening agents as layers of transaction.

3) THERE ARE NO OPTIONS FOR OTHER HEATING SERVICES

Murray Morgan testified the protective covenants prohibit the use of propane tanks. (Hearing TR p. 84 line 5) SCHOA believes Boyne's position is the Amended Covenants of Mountain Village Subdivision prevent SCHOA from having a propane tank located within the subdivision. (Direct Testimony of Murray Morgan p. 9)

Secondly SCHOA doesn't own any land outside the footprint of the building on which a propane tank could be located thus land would have to purchased and the covenants removed so a tank could be put there. (Hearing TR p. 84 line 7-10)

4) THE ENABLING LEGISLATION REQUIREMENTS ARE MET ALLOWING THE COMMISSION TO REGULATE ABACO

The Commission's enabling legislation defines the term "Public Utility" for purposes establishing the parameters of its jurisdiction. MCA §69-3-101, *et seq.*

A clear reading of this statute is that every company who owns, operates or controls equipment within the state of Montana for the delivery or furnishing to persons of heat and/or power in any form is a public utility. ABACO acknowledges it has contracts with Boyne U.S.A. and other customers for the production of propane. ABACO admits that propane it furnishes is consumed for the purpose of furnishing heat and power in the state of Montana. Thus, ABACO is by its own admission governed by the provisions of the enabling legislation which authorizes governance by this Commission.

ABACO contends that because the word "propane" is not found in MCA §69-3-101, that this Commission lacks jurisdiction over that gas that admittedly produces power and heat. "Natural gas" is likewise not mentioned in MCA §69-3-101, nor is "electricity," yet this Commission governs the distribution of those energies. Whether this Commission has jurisdiction over a company is determined by MCA §69-3-101 regarding whether that company owns, operates, or controls equipment, the purpose of which is to produce heat and/or power. ABACO admittedly does that and, therefore, must concede this Commission's jurisdiction over it.

Clearly, the enabling statute has been interpreted by this Commission to allow it to regulate propane.

The Montana Supreme Court found this Commission had the right to regulate natural gas

conveyed by Gallatin Natural Gas Company even though that term was not found in the enabling legislation. There is little doubt the Montana Supreme Court would uphold this Commission's decision to similarly find this Commission has jurisdiction over ABACO because it owns, operates, or controls equipment for the production, delivery, or furnishing of propane for heat or light purposes.

Judicial interpretation of MCA §69-3-101 confirms this Commission's jurisdiction.

SCHOA's Opening Brief throughly analyzed Gallatin National Gas Company v. Public Service Commission 79 Mont 268 566 P.2d 377 (1997). That analysis was also part of SCHOA's Brief in Opposition to ABACO's Initial Motion to Dismiss. That Brief and SCHOA's Initial Brief are incorporated by reference herein.

5. ABACO'S "CLOSED GROUP" ARGUMENT IS FATALLY FLAWED

ABACO's argument that access to ABACO's propane is by permission only is negated by two important concepts. First, the group ABACO describes has over 200 customers. That is neither small or closed. Secondly, ABACO is a public utility because it meets the definition of public utility as defined in MCA 69-3-101. It is a private company who owns, operates and controls plant and equipment for the production and delivery of a product that is used to generate heat. Its customer includes SCHOA and over 200 customers in the Big Sky Community. ABACO contends it does not offer propane to the general public but rather to members of a private or select group. However the focus of the Commission should be on who is buying and occupying the structures heated by ABACO's propane.

ABACO agrees that Boyne has planned an ambitious expansion. SCHOA introduced Ex. 1-4 Big Sky Resort Overall Development Plan November 30, 2015. Barb Rooney testified that if

Boyne has plans to build a hotel by 2019 it would be going to ABACO and asking to use ABACO's propane and not some other source. (Hearing TR p. 185) As pointed out in SCHOA's Opening Brief, Boyne anticipates significant expansion in the next few years for commercial and residential uses. The claim that ABACO does not advertise to the public does not mean ABACO does not affect the public. The claim that ABACO does not solicit customers does not mean new customers, being end users of the newly developed Boyne properties are not customers of ABACO.

ABACO has created with its contract with Boyne and the activities resulting from the contract a unique situation. ABACO acquires new customers when Boyne sells it's new developments to the public. As Boyne sells it's new developments to the public, it is the same public that is using ABACO's propane in the new developments. ABACO is affecting the public.

ABACO is contractually obligated to provide all of the propane Boyne requests. Barb Rooney has testified that it was never the intention of Boyne to operate the propane system. Boyne is not a propane company. Boyne is a ski company and a hotel company. If ABACO got out, it would be highly unlikely Boyne would get into the business. (Hearing TR p. 199 lines 11-20)

There is legal precedent for this Commission's conclusion that the contractual arrangement between ABACO and Boyne results in providing propane to the public. The Supreme Court of New Jersey in Lewandowski v. Brookwood Musconetcong River Property Owners Association, 37 N.J. 433 181 A.2d 506 (1962) looked at a similar contractual relationship and found a private company who contracted with a developer to provide all of the

developer's water was a public utility, in part, because the developer's sales campaign was directed to the public at large and as an inducement to perspective buyers that water service would be provided.[1] In Lewandowski the developer Brookwood Musconetcong River Corporation began developing a tract of land containing 1000 lots. The developer created a non profit association, in part, to provide utility services to the future development. There were three classes of membership; original active, active, and honorary. The original active membership was the developer, the active membership consisted of owners of lots purchased from the developer. Only original active members had the power to elect directors. The developer entered into a written contract with the Association. The Association would pay the total cost of construction, installation and maintenance of the water supply system. Individual lot owners would pay for water consumed. Later the developer conveyed most of the unsold lots to Gennert who began to sell them. Lot owners at the time of the purchase were required to join the Association. Certain lot owners petitioned the Board of Public Utility Commissioners for the State of New Jersey complaining of excessive charges and defects in the water system. They requested the Board take jurisdiction and compel the Association to return funds improperly obtained and to provide safe and adequate water supply at reasonable rates. The Association responded that the Board was without jurisdiction because the Association was not a public utility. The Board after considering testimony found, inter alia, that the Association held the water system as a public utility because membership restrictions were so broad that it could not be construed as a private limited Association.

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[1] Please recall in the Master Development Plan ABACO was included by Boyne to provide dry utilities to the new development. See Ex. 1-4 p. 10.

The Association then appealed. The New Jersey Supreme Court recognized their State Statue N.J.S.A. 48:2-13 that the term "public utility" shall include every individual, co-partnership, association, corporation... that now or hereafter may own operate manage or control within this state... water... plant or equipment for public use.... The primary issue was whether the Association came under that definition. The statute required a showing that the Association owns, operates, manages or controls a water system for public use. The Association argued the water system is not "for public use" because there is no undertaking to serve the public at large, the service being exclusively for a group of neighbors who have banded together for their own welfare; and the mere possibility of an expansion in the size of the development by a subsequent acquisition of adjacent lands would not alter the character of the use. According to the petitioners the developer induced the general public to buy lots on the representation that water would be supplied from a central source, thus making the system "for public use"

> By contacting the Developer, the Association created a water system for the benefit of its potential members, i.e., future purchasers of lots from the developer. These purchasers included not only prospective buyers of lots in the present development but also those who might buy lots in any adjoining property the Developer acquired. Indeed, when the Association executed, the membership of the Association did not include any consumers for whose benefit the water system was intended. At that time the Developer had not begun to sell its lots and the only members of the Association were the Developer and its agents. The Developer's subsequent sales campaign was directed to the public at large, and , as an inducement to prospective buyers, it represented that water service would be provided. It was impossible for an one to buy a lot without becoming a member of the Association. A prospective purchaser submitted an application for Association membership in which he agreed to maintain his membership, abide by its rules, pay the annual charges levied and pay a stipulated sum for the installation of water mains. Contemporaneously with receiving his deed a buyer became a member of the Association. At the time of the hearing the purchasers numbered 350 to 400 and unsold lots were still available to the public. An undertaking of this size with consumers being indeterminate from the outset cannot be classified as a project merely among neighbors and colored **477* by any

> private cast which might attach to such a group. The character of the use is clear, I.e., to serve all members of the public who buy lots from the Developer. The extent of the use is equally clear, i.e., an entire housing development is dependent upon the Association for a prime necessity of life as the character and extent of the use make it public, we conclude the Association is operating a water system "for public use" within the meaning of N.J.S.A 48:2-13.

Similarly ABACO is supplying propane to heat hundreds of units Boyne will or in the past has developed. As Boyne grows so does ABACO's affect on the public and the heating consumer. In the summer of 2015 there was development of additional housing with ABACO installing additional lines to the 15 unit expansion known as Homestead Chalet's. See documents attached to SCHOA Data Request 007 to ABACO which includes email from Su-Lin Tschider to Joy McMullen dated July 15, 2015 at an ABACO Energy bill for work and materials provided to Boyne in the sum of $12,000.

The system is essentially not closed and it is not for permission only. ABACO must provide propane to every person who buys a unit whether commercial or residential from Boyne. The purpose of the contract is to assure purchasers of housing from Boyne, who are the public, that they will have heat in their units they purchase.

The Lewandowski Court's analysis that the character of the use i.e. to serve all members of the public who buy lots from the developer thus making the water company a public utility was adopted in Cedarglen Lakes Water v. Taxation Division Director, 7 N.J. Tax 233 Tax Court of New Jersey (1985). The Plaintiff Cedarglen Lakes Water Company was a New Jersey Corporation which supplies water to residents in the Cedarglen Lakes Residential Community. The water company was wholly owned by stock holders of Cedarglen Lakes, Inc. Cedarglen Lakes Inc. owned a 220 acre tract of land and 1238 residential dwelling units located on the tract.

Those who wished to live in the community purchased a share of Cedarglen Lakes, Inc. and were simultaneously given a share of Cedarglen Lakes Water Company Stocks. Since there were a total of 1238 units in the development, there were a total of 1238 shares of stock each for Cedarglen Lakes, Inc. and Cedarglen Lakes Water Co. In 1977 the Board of Public Utilities decided Cedar Lakes Water Company was a public utility under its jurisdiction. However the Board granted it an exemption. in 1982 the tax division director assessed a gross receipt tax and an excise tax totaling $4301.00. The Water Company paid the tax and then filed a complaint for a refund. The excise and gross receipt tax were assessed on the amount of roads within the community that were open and used by the public. If the streets were not public, the tax could not be assessed. The Tax Court analyzed the Lewandowski decision. Tax Court in analyzing Lewandowski understood that "public use" depends on the character and extent of the use. The Tax Court held that although the New Jersey Supreme Court found that the Association had no obligation to supply water to the "general" public or any specific portion thereof, that was immaterial in light of the fact the water was being supplied to a broad group of consumers. The Tax Court understood the Supreme Court held the water system was operated for "public use" utilizing the following factors; 1) The association had created a water system that was for the benefit for the perspective purchasers of lots in the development, the developer sale campaign was directed to the public at large and as an incentive to a potential purchaser. It represented that water service would be provided. The Tax Court realized the language from Lewandowski was important, i.e., the entire housing development was dependant upon the association for a prime necessity of life. As the character and extent of the use make it public the Association is operating the water system for public use.

The Tax Court concluded:

> The Lewandowski construction of "public use" was in the context of a proceeding to determine whether a water system was a public utility within the jurisdiction of the Board of Public Utilities while this proceeding involved the determination of what the work "public" means in the context of the Public Utility Gross Receipts Tax Act.

6. SALES TO VERY FEW SELECTED CUSTOMERS CONSTITUTES SERVICE TO THE PUBLIC

The Lewandowski analysis is the accepted analysis in determining what is public use in a regulated utility context. The viewpoint that there must exist a legal obligation to serve any member of the public is merely one way of defining a public utility. A public utility also embraces any business which is affected with a public interest. As the United States Supreme Court said in Munn v. Illinois 94 US 113, 126, 24 L.ed. 77 (1876): Property does become clothed with the public interest when used in a manner to make it a public consequence, and affect the community at large. In Munn, the Unites States Supreme Court held that grain elevators can be regarded as public utilities, subject to regulation, because they are serving a public interest. The decision was based upon the necessity of a service to the community, together with the existence of a virtual monopoly.

There are numerous jurisdictions which have examined the issue of whether a company serving a few select customers is a public utility. A thorough analysis of this issue is contained In the Matter of the Application of Dome Pipeline Corporation for Authority to Construct and Operate Dual Liquid Hydrocarbon Pipelines in Lenawee , Monroe and Wayne Counties. Dome Pipeline Construction Guardian Industries Corporation and National Steel Corporation Plaintiff - Appellants v. Public Service Commission Michigan Consolidated Gas Company and Michigan

Gas Utilities, Defendants- Appellees 439 N.W. 2d 700 103 P.U.R. 4d 415. One of the issues presented was Plaintiffs' argument that Dome Pipeline could not be considered a public utility because it does not and will not provide a service to the public. The Appellate Court rejected that argument and found that the majority of jurisdictions which have addressed the question have held that sales to even a few select customers constitutes service to the public and renders the company a gas utility subject to regulation.

> A majority of courts which have addressed the question have held that sales to even a few selected customers constitutes "service to the public" and renders the company a gas utility subject *235 to regulation. See State Commerce Comm v. Northern Natural Gas co. 161 N.W. 2d 111 (Iowa, 1968) (93 nondomestic retail customers and 500 farm taps); Cities service Gas Co. V. State Corporation Comm., 222 Kan. 598, 567 P.2d 1343 (1977) (5 municipal customers); public service comm v. Panhandle Eastern Pipeline Co., 224 Inc. 662, 71 N.E. 2d 117 (1947), aff'd 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128 (1947) (one industrial customer); Northern Natural Gas Co. V. Public Service Comm, 292 N.W. 2d 759 (Minn., 1980) (34 Industries and 2,100 farmers); Dairyland Power Cooperative v. Brennan, 248 Minn. 556, 82 N. W. 2d 56 (1957) (service to members only); Industrial Gas Co. V. Public Utilities Domm., 135 Ohio St. 408, 21 N.E. 2d 166 (1939) (19 industrial and 12 private customers); Trico Electric Cooperative, Inc. V. Corporation Comm., 86 Ariz. 27, 339 P.2d 1046 (1959) (smaller number of customers); Griffith v. Public Service Comm., 86 N.M. 113, 520 P. 2d 269 (1974) (one residential subdivision); Lewandowski v. Brockwood Musconetcong River Property Owners Assh, 37 N.J. 433, 181 A.2d 506 (1962) (one residential subdivision); Oklahoma ex rel. Cartwright v. Ordinance Works Authority, 613 P.2d 476 (Okla., 1980) (small number of customers); In re Petition of South Jersey Gas Co., 226 NJ Super 327, 544 A.2d 402 (1988), (one customer).

Boyne's continued expansion fueled by ABACO's propane affects the public. The majority of jurisdictions examining the issue of select customers have rejected that argument. The Commission should do likewise and exercise regulatory authority over ABACO.

CONCLUSION

The great weight of evidence introduced, testimony presented and legal authority submitted allows this Commission to exercise regulatory jurisdiction over ABACO. ABACO admits it is SCHOA's propane company. Boyne has declined to oppose the argument submitted in SCHOA's Opening Brief. Neither Boyne nor SCHOA are intermediaries in ABACO's distribution of propane. As Boyne grows and sells its properties the need for ABACO's propane likewise increases. ABACO thus is affecting the public interest which justifies regulation.

Respectfully Submitted this 13 day of September, 2016

LANDOE, BROWN, PLANALP & REIDA, P.C.

By: _____
J. Robert Planalp

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September 2016, a true and correct copy of the foregoing was this day served as follows:

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