

Service Date: February 18, 2015

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)	DOCKET NO. D2013.9.71
Facility)	
)	ORDER NO. 7393
Complainant,)	
)	
v.)	
)	
ABACO ENERGY SERVICES, LLC)	
a North Dakota Limited Company,)	
)	
Defendant.)	

ORDER ON MOTION TO DISMISS

PROCEDURAL HISTORY

1. On September 30, 2013, Shoshone Condominium Hotel Owner’s Association (“Shoshone”) filed a Complaint asking the Montana Public Service Commission (“Commission”) to take jurisdiction over the propane delivery system at the Big Sky Ski Resort (“the propane system”) owned by ABACO Energy Services, L.L.C. (“Abaco”).

2. On November 12, 2013, Abaco filed a Motion and Brief in Support of Motion to Dismiss Shoshone’s Complaint. On January 10, 2014, Abaco filed a Reply Brief on the Motion to Dismiss and requested an oral argument. An oral argument was held before the Commission on April 22, 2014.

FINDINGS OF FACT

3. Abaco owns the propane system. Aff. Stacy Tschider at ¶ 2 (Nov. 2, 2013). Abaco sells propane to Boyne U.S.A., Inc. (“Boyne”), individual homeowners, and businesses

within the footprint of the Big Sky Ski Resort Property. Oral Argument Recording, 35:00 (Apr. 22, 2014).¹

4. The propane distribution system was built in 1996 by the Montana Power Company. Aff. Tschider at ¶ 6. NorthWestern Energy bought the system in 2002. *Id.* In 2007, Abaco bought both the Big Sky system and the Anaconda Job Corps system from NorthWestern. *Id.*

5. “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.” *Id.* at ¶ 3

6. The Commission currently regulates this system for safety. Federal law concerning pipeline safety regulation, which is incorporated in Admin. R. Mont. 38.5.2202 (2015), only exempts pipelines with fewer than 10 customers that are not located in public places. 49 C.F.R. § 192.1(b)(5) (2014).

7. Residents are free to install their own tanks, Aff. Tschider at ¶ 4, but all of the land on which the system operates is owned by Boyne making the possibility of private instillation of propane tanks and bottles unclear. Oral Argument Recording at 28:40. Boyne has the right to buy the system once the contract with Abaco ends. Aff. Tschider at ¶ 5.

Commission analysis and decision

8. Shoshone argues Mont. Code Ann. § 69-3-101 (2013) grants the Commission authority to regulate the system. Abaco argues Mont. Code Ann. § 69-3-101 does not apply to propane systems and if the Commission did use this section to regulate propane distribution systems, propane bottles and tanks would also fall within the Commission’s regulatory jurisdiction. Abaco acknowledges that other propane systems are regulated by the Commission but this jurisdiction is granted by virtue of franchise rights and the doctrine of estoppel.

9. In reviewing motions to dismiss for lack of jurisdiction, “the allegations of the complaint must be viewed in a light most favorable to plaintiffs, admitting and accepting as true all facts well-pleaded.” *United States Nat’l Bank v. Montana Dep’t of Revenue*, 175 Mont. 205, 207, 473 P.2d 188 (1977) (quoting *Board of Equalization v. Farmers Union Grain Terminal Assoc.*, 140 Mont. 523, 531, 374 P.2d 231, 236. (1962)).

¹ Available at <http://psc.mt.gov/Docs/WorkSessions/WorkSessionAudio/?year=2014>.

Definition of a public utility under Mont. Code Ann. § 69-3-101

10. The Commission has authority to regulate utilities under Mont. Code Ann. § 69-3-101, which in relevant part states:

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;

...

(c) light;

(d) power in any form or by any agency;

11. The Commission finds that Abaco's ownership of the propane system constitutes (1) a private corporation (2) that owns, operates or controls (3) any plant or equipment (4) for the production, delivery, or furnishing of heat, light, or power in any form (5) to other persons, firms, associations, or corporations (6) within the state of Montana and the propane system is therefore a public utility pursuant to Mont. Code Ann. § 69-3-101. These six requirements are addressed in turn below.

12. Abaco is a limited liability corporation, Shoshone Complaint, 1 (Sept. 20, 2013), that qualifies as a "corporation, both public and private, company, individual, association of individuals, and their lessees, trustees, or receivers appointed by any court." Mont Code Ann. § 69-3-101.

13. Abaco admits it currently owns, operates, and controls the propane system. Aff. Tschider at ¶ 3.

14. The propane distribution system clearly falls within the statutory definition of "any plant or equipment, any part of a plant or equipment." Mont. Code Ann. § 69-3-101.

15. Abaco appears to contend that a finding that the Commission has jurisdiction over propane distribution systems through Mont. Code Ann. § 69-3-101 would result in regulation of propane bottle distributors such as Northern Energy, Montana Propane, and AmeriGas. Abaco Reply Brief, 3 (Jan 1, 2014). This argument is irrelevant. Customers of those companies have not complained to the Commission. If a complaint was filed against a propane tank and bottle company, the Commission, as here, would consider the facts of the situation and whether

propane tanks and bottles, like an underground distribution network for propane, falls within the statutory definition of “plant or equipment.”

16. The Commission has constantly regulated underground propane distribution systems when the utility has more than one customer. *See, e.g.* Tariff for Miller Oil Company, Dkt. D2015.1.12 (Feb. 3, 2015); Tariff for Five Valleys Gas Company, Dkt. 2014.1.12 (Dec. 18, 2014); Or. 7344b (Nov. 13, 2014) (NorthWestern Energy Townsend Propane); Or. 7132c ¶ 113 (Nov. 17, 2011) (Hardy Creek Propane). However, the Commission does not have a tradition of regulating propane tanks or bottles. Absent statutory language, administrative rules, or practice to the contrary, authority to regulate propane tanks, bottles, and trucks “is to be regarded as if it [does] not exist.” Mont. Code Ann. § 1-3-221.

17. Abaco furnishes heat, light, and power through its propane distribution system in accordance with Mont. Code Ann. § 69-3-101. Abaco argues that heat in Mont. Code Ann. § 69-3-101 does not apply to propane and in 1913 at the passage of the enabling act, heat probably meant steam heat. Oral Argument Recording at 1:24:05. Abaco argues currently regulated propane distribution systems—such as NorthWestern in Townsend, Miller Oil in Culbertson, and Five Valleys Gas in Seeley Lake—are regulated through franchise rights and the doctrine of estoppel. *See discussion infra* ¶¶ 25-28. Like propane, Abaco argues that natural gas is not heat under Mont. Code Ann. § 69-3-101 and is also regulated by virtue of franchise rights and estoppel. Oral Argument Recording at 1:26:23.

18. This assertion regarding natural gas is inaccurate; the Montana Supreme Court has stated “it is a matter of common knowledge that natural gas is consumed for the purpose of furnishing heat, light, and power” and the plaintiff in that case was considered a public utility under the Commission’s enabling statute. *Gallatin Natural Gas Co. v. Public Serv. Comm’n*, 79 Mont. 269, 280, 291, 256 P. 373 (1927). Propane is indistinguishable from natural gas based on these uses and heat in Mont. Code Ann. § 69-3-101 is not limited to steam heat. Propane, like natural gas, meets the plain meaning of heat, light, and power under Mont. Code Ann. § 69-1-101 and is under the jurisdiction of the Commission.

19. The Commission finds that Abaco is serving “other persons, firms, associations, or corporations, private or municipal” through this propane distribution system. Mont. Code Ann. § 69-1-101. Abaco argues it does not sell to Shoshone but that Boyne sells propane to Shoshone. Oral Argument Recording at 11:26. Despite these claims, Abaco states “there are

individual homeowners and businesses within the footprint of the Big Sky Ski Resort Property that have asked to have their propane delivered by Abaco.” Oral Argument Recording at 34:57. Abaco also admits it is billing individual users of the system. Oral Argument Recording at 1:18:37.

20. Abaco argues that “[a] contractual arrangement to provide limited service is not a profession of public utility service” citing *Lockwood Water Users Ass'n v. Anderson*, 168 Mont. 303, 542 P.2d 1217 (1975). Abaco Mot. to Dismiss Brief, 5 (Nov. 12, 2013). *Lockwood Water Users Ass'n* addressed Commission authority to regulate a member-only water system association. “Only members . . . are allowed to use the system and they use it on a nonprofit cost sharing basis.” *Lockwood Water Users Ass'n*, 168 Mont. at 310. The court found this type of service to be contractual and beyond the jurisdiction of the Commission. *Id.*

21. In *Lockwood Water Users Ass'n.*, the Montana Supreme Court stated:

[T]he most important test used in determining whether such an organization or group is in fact a public utility in this respect is the factor of *servicing or willingness to serve* the entire public within the area in which the facilities of the organization are located. If it confines its service to its own stockholders or to members of its own group, and does not serve or hold itself out as willing to serve the public, it is not ordinarily considered a public utility.

Id. at 309 (emphasis added). Abaco and Boyne have not enacted restrictive memberships as to exclude the general public. They have offered their services to anyone near the system who “have asked to have propane delivered by Abaco.” Oral Argument Recording at 35:00. In conjunction with each other, Abaco and Boyne are servicing and willing to serve the entire public. Their service is not contractual under the *Lockwood* test and is not exempted from the Commission’s jurisdiction.

22. Abaco argues that this system “has always been understood NOT to be a utility operation subject to regulation” and “[t]he Montana Power Company’s 1997 FERC From 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.’” Abaco Reply Brief at 2. This conclusion ignores the growth of customers served under the propane system since 1997. The Commission is aware the propane system was originally used to heat sidewalks, but has since added service to various properties around the Big Sky area. A propane provider could transform from a nonutility property to a utility property by simply adding customers and not limiting service to

members of a group or stockholders. Thus, the propane system is currently serving other persons, firms, associations, or corporations.

23. Finally, the propane system is clearly located in the State of Montana.

24. The Commission finds it has jurisdiction over the Big Sky propane distribution system owned by Abaco though Mont. Code Ann. § 69-3-101 based on allegations of the complaint viewed in a light most favorable to Shoshone, admitting and accepting as true all facts well-pleaded. *United States Nat'l Bank*, 175 Mont. at 207.

Abaco's theory of estoppel and franchise rights.

25. Abaco acknowledges that other propane distribution systems are under Commission's jurisdiction but claims this authority is not granted through Mont. Code Ann. § 69-3-101. Abaco argues the Commission has authority over some propane systems because these companies have held themselves out as public utilities to gain access to municipal franchise rights and they are prohibited by the doctrine of estoppel from claiming otherwise before the Commission. Estoppel is defined as "[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." Black's Law Dictionary 570 (7th ed. 1999). The Big Sky system does not operate under a franchise because Boyne owns all the land on which the system operates and Big Sky is not an incorporated city. Abaco Reply Brief at 4. Abaco argues since it does not require franchise rights, they cannot be barred from claiming they are not a public utility; therefore the propane system is not a public utility.

26. This is an outdated mode of utility regulation. "Prior to the date upon which the [Commission's Enabling] Act was passed, every rate to a consumer of a product of a public utility in Montana rested on private contract between the consumer and the utility." *Billings v. Public Serv. Comm'n*, 67 Mont. 29, 36, 214 P. 608 (1923). The enabling act effectively ended this form of contractual regulation:

When the legislature created the Public Service Commission as an administrative arm of the sovereignty, giving to the agency thus created ample authority to exercise through the police power of the state a supervisory control over all public utilities, the sovereign prerogative was asserted. In creating the commission the intention of the legislature was "to provide a comprehensive and uniform system of regulation and control of public utilities."

Billings v. Public Serv. Comm'n, 67 Mont. at 36 (quoting *State ex re. Billings v. Billing Gas Co.*, 55 Mont. 102, 112, 173 P. 799 (1918)). The Montana Supreme Court has also stated “since 1913 the Public Service Commission has had exclusive jurisdiction over the subject of rate regulation of this company, that the provisions of the franchise contract fixing rates were superseded by the rates approved by the Commission.” *State ex rel. Billings*, 55 Mont. at 112 (1918).

27. Abaco in setting out its theory of utility regulation through franchise rights and estoppel cites the following statutes: Mont. Code Ann. § 7-13-4101 (“Authority to permit laying of utility mains”); Mont. Code Ann. § 7-1-4123(8) (A municipality’s legislative powers include the ability to grant franchises); and Mont. Code Ann. § 7-5-4321 (procedure for granting exclusive franchise). All of these statutes pertain to local government under Title 7 of the Montana Code Annotated. Montana case law is clear, for rate setting, municipal franchise authority is superseded by the Commission. *State ex re. Billings*, 55 Mont. at 112; *Billings*, 67 Mont. at 36; *Helena L. & R.R. v. Northern Pac. Ry.*, 57 Mont. 93, 105, 186 P. 702 (1920). The Commission's rate making authority is governed by Mont. Code Ann. § 69-3-101 and the Commission’s enabling act replaced the paradigm of “private contract between the consumer and the utility.” *Billings*, 67 Mont. at 36.

28. Abaco’s theory rests on the belief that other propane utilities are self-professed public utilities for the purpose of gaining public right of way from cities. Oral Argument Hearing at 14:09. The Montana Supreme Court has held companies “should be classed as a public utility regardless of its protestations or professions to the contrary.” *Gallatin Natural Gas Co*, 79 Mont. at 275. Rather than relying on a company either denying or admitting public utility status, the conditions stated in the enabling act determine whether the Commission has jurisdiction over an entity. *Id.* Commission jurisdiction is governed by Mont. Code Ann. § 69-3-101—not agreements entered into by separate parties.

Involvement of Boyne

29. Boyne appears to be an indispensable party to this proceeding and could be considered a respondent party. Commission rules allow for involvement of third parties not named in the complaint as respondent party status:

"Respondent" means any party subject to the jurisdiction of the commission to whom the commission issues notice instituting a proceeding or investigation or inquiry of the commission; and any party in interest or person ordered before any pending proceeding of the commission.

Admin. R. Mont. 38.2.901. Boyne is the common contractual connection between Abaco and Shoshone. Abaco states that Boyne sells propane to Shoshone. Oral Argument Recording at 11:26. Boyne has the right to buy the system once the contract with Abaco ends. Aff. Tschider at ¶ 5. Further, Shoshone has alleged in other venues that Boyne is inflating the rates charged for propane from Abaco. See Complaint at ¶¶ 22-31, *Shoshone Condominium Hotel Owner's Association v. Boyne USA, Inc.*, DV-13-62C (Mont. 18th Jud. Dist. 2013); see also Notice of Commn. Action (NCA), Dkt. D2013.9.71 (Sept. 4, 2014). Boyne seems to qualify as “any party in interest” that can be “ordered before any pending proceeding of the commission.” Admin. R. Mont. 38.2.901; see also Mont. Code Ann. §§ 2-4-104, 69-3-106(1) (statutory authority for Commission’s subpoena power).

30. Despite Boyne’s significance in this proceeding, the Commission is not prepared to order Boyne to become a respondent party *sua sponte*. Therefore, the Commission invites Boyne to voluntarily become an intervening party to this proceeding; if Boyne declines to become an intervening party to this proceeding, the Commission shall establish a scheduling conference, including Boyne, to set briefing on the issue of Boyne’s involvement in this proceeding.

CONCLUSIONS OF LAW

31. The Commission has full power of supervision, regulation, and control of public utilities in Montana. Mont. Code Ann. § 69-3-102. Public utilities are defined by the criteria presented in Mont. Code Ann. § 69-3-101.

32. In reviewing motions to dismiss for lack of jurisdiction, “the allegations of the complaint must be viewed in a light most favorable to plaintiffs, admitting and accepting as true all facts well-pleaded.” *United States Nat’l Bank*, 175 Mont. at 207.

33. While “Montana Rules of Civil Procedure do not govern an administrative proceeding, they may still serve as guidance for the agency and the parties.” *Citizens Awareness Network v. Mont. Bd. of Env’tl. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583.

ORDER

IT IS HEREBY ORDERED THAT:

1. Abaco’s Motion to Dismiss Shoshone’s Complaint is denied.
2. Abaco must preserve current rates for the propane system for the next 12 months

until a tariff rate is developed. These rates are not to be considered just and reasonable under Commission rate making authority and apply only on an interim basis.

3. If Boyne declines to become an intervening party to this proceeding by March 3, 2015, the Commission shall establish a scheduling conference, including Boyne, to set briefing on the issue of Boyne's involvement in this proceeding.

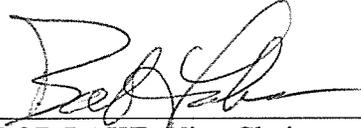
4. The Complaint will now proceed pursuant to Mont. Code Ann. § 69-3-102 and Admin. R. Mont. 38.2.2101-2107.

DONE AND DATED this 24th day of November, 2014, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION



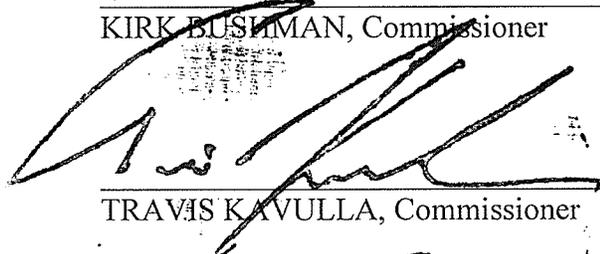
W. A. GALLAGHER, Chairman



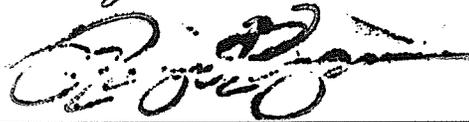
BOB LAKE, Vice Chairman



KIRK BUSHMAN, Commissioner



TRAVIS KAVULLA, Commissioner



ROGER KOOPMAN, Commissioner

ATTEST:



Aleisha Solem
Commission Secretary

(SEAL)

