Service Date: May 15, 2015

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

ORDER ON RECONSIDERATION

Background

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.

3. The Commission issued Order 7393 denying ABACO's Motion to Dismiss on February 18, 2015. Based on the allegations in Shoshone's Complaint, the Commission found that ABACO qualified as a public utility under Mont. Code Ann. § 69-3-101 (2015) and the Complaint should not be dismissed for lack of subject matter jurisdiction. Additionally, the Commission ordered that "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." Or. 7393 pp. 8-9 (Feb. 18, 2015). The Order also contemplated involvement of Boyne U.S.A., Inc. ("Boyne") in this docket.

4. On February 25, 2015, ABACO filed a Motion for Extension of Time to File Motion for Reconsideration of Order No. 7393, which was granted in a Notice of Staff Action. On March 13, 2105, ABACO filed a Motion to Reconsider and Brief in Support. The Commission held a work session on April 24, 2015 and voted to reconsider and modify the Commission's Order.

Discussion, Findings, and Conclusions

5. ABACO's Motion to Reconsider argues that Commission Order 7393 was unlawful and unjust and requires modification in two ways. Mot. to Reconsider, p. 1 (March 13, 2015). "First, the Commission's findings of fact that ABACO is a public utility is in error as its findings regarding ABACO's service to and willingness to serve the general public are incorrect, rendering the legal conclusion that ABACO falls under the Commission's jurisdiction incorrect." *Id.* at pp. 1-2. "Second, the Claimant, [Shoshone] does not have standing to assert a claim against ABACO because it is not a customer of ABACO and is not 'directly affected' by ABACO's rates, charges, and practices." *Id.* at p. 2. These claims are addressed in turn.

Willingness to Serve the Public under Lockwood

6. ABACO in its Motion for Reconsideration provides a much fuller account than it did in its initial briefing of how its system meets the criteria *Lockwood Water Users Ass'n v. Anderson*, 168 Mont. 303, 542 P.2d 1217 (1975), which would exempt ABACO from public utility status under Montana law. The *Lockwood* test is the appropriate law to engage on this matter, however, ABACO's Motion for Reconsideration fails to fully consider the relevant facts and ultimate holding in this case. That case concerned whether a "voluntary nonprofit corporation organized for the purpose of supplying water to its members" qualified as a public utility. *Lockwood Water Users Ass'n.,* 168 Mont. at 304. The court ultimately found the Lockwood Association was not a utility because "service is rendered only to members who share the costs of operation. The service is contractual." *Id.* at 310.

7. Focusing on the facts of *Lockwood*, a distinction can be made to ABACO. In Lockwood, the association sold memberships for $50. *Id.* at 305. The association adopted articles of incorporation and by-laws. *Id.* Additionally, the association was formed as a non-profit corporation. *Id.* ABACO has not presented any information that its situation contours the facts of the *Lockwood* test in this regard.

8. ABACO argues the Commission's position on restrictive memberships with regards to the system in question "is disputed by the Second Affidavit of Mr. Tschider." Mot. to Reconsider at p. 6. This Affidavit states the limitations ABACO has in place:

> ABACO does not hold itself as open to the public in general; it serves only particular customers. ABACO reserves the right to refuse service to any new customers. ABACO is not obligated to enroll new customers onto its system, and can choose (and has chosen) to offer service or not at our sole discretion. ABACO does not advertise for its services, does not solicit new customers, has not contacted any of the many developers or real estate agents in Big Sky to offer services, nor applied for any permits to expand its existing pipeline system beyond its current service area. ABACO does not operate outside of the limited Boyne Resort area which is at the base of the ski lifts or within a short walking distance.

2nd Aff. Tschider ¶ 15 (Mar. 11, 2015). The restrictions espoused by ABACO are different in form and substance from what the association in *Lockwood* had enacted. The limitations offered by ABACO do not have the same demonstrative assurances that $50 cost of service memberships, articles of incorporation and by-laws, and status of a non-profit corporation did in *Lockwood*. The Commission is concerned without easily identifiable actions to restrict membership, like what was done in *Lockwood*, a service provider could too easily disclaim serving the public without actually doing so. Mere proclamations and protestations are insufficient to this determination. *See Gallatin Natural Gas Co. v. Public Serv. Comm'n*, 79 Mont. 269, 275, 256 P. 373 (1927). *Lockwood* supports the Commission's position that actual steps need to be taken to limit membership at the *ex anti* stages of forming a service. ABACO has failed to demonstrate these steps.

9. ABACO argues a finding to this effect "is not supported by any witness testimony." Mot. to Reconsider at p. 6. Shoshone has presented facts consistent with the allegations in the complaint, *i.e.* ABACO is a public utility. Complaint, p. 2 (Sept. 30, 2013). The Commission "must determine whether the complaint states facts that, if true, would vest the [Commission] with subject matter jurisdiction." *Poteat v. St. Paul Mercury Ins. Co.*, 277 Mont.

117, 119, 918 P.2d 677 (1996). Since Shoshone's Complaint has accomplished this, ABACO must present reasoning proving it meets the *Lockwood* exception and a lead the Commission to believe the legal conclusions or allegations of the Complaint have no factual basis. *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6. ABACO has not done this, and the Commission will continue to examine the Complaint in a light most favorable to the Complainant, and all allegations of fact contained therein are taken as true. *Id.*

10. ABACO focuses on language concerning the company "holding itself out as willing to serve the public" as a requirement for public utility status. Mot. to Reconsider at pp. 5-6. In that particular passage, the *Lockwood* court examines two conjunctive requirements for the public utility status exception. "If [service provider] 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). The use of "and" clearly requires that both conditions be satisfied before a service provider can be exempted from public utility status. Nothing has been provided by ABACO showing a limited membership or stockholder arrangement. Again, the Commission need not make this finding for them in the face of a well-pleaded complaint to the contrary.

11. Additionally, ABACO argues that it "does not serve the general public as a matter of right. It serves selected and particular customers by permission only." Mot. to Reconsider at p. 6. ABACO makes this assertion in reference to Lockwood's statement "where the public has not a legal right to use it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission." *Lockwood*, 168 Mont.at 309. ABACO's interpretation of this language concerning the public's legal right to use a service raises a circular logical fallacy. Only public utilities subject to Commission regulation have a legal obligation to serve the public. Mont. Code Ann. § 69-3-201 ("Every public utility is required to furnish reasonably adequate service and facilities"); *Polson v. Public Serv. Comm'n*, 155 Mont. 464, 475, 473 P.2d 508 (1970). Under this proposed reasoning, a service could only become a public utility after it had already been deemed a public utility. This presents an impossible bootstrapping conundrum to initiate regulation of a service that has not submitted to public utility status and the Commission's jurisdiction. The Montana Supreme Court has found that elective utility status is contrary to the Commission's enabling act. *See Gallatin Natural Gas Co.*, 79 Mont. at 275. Therefore, the Commission is unwilling to allow this interpretation to

overshadow the important factual application of law in Lockwood: the association was not a public utility because "service is rendered only to members who share the costs of operation." *Lockwood,* 168 Mont. at 310.

12. If any ambiguity remains in the application of *Lockwood* to ABACO, the Commission should return to statute for guidance. Mont. Code Ann. § 69-3-101 defines a public utility as (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. Focusing on the fifth factor, a plurality of customers is required for a service provider to be defined as a public utility. First, ABACO admits it provides "service to individual end users in Cedar Creek, Powder Ridge, and Stillwater." 2nd Aff. Tschider at ¶ 12. Second, the Montana Supreme Court has indicated a refusal to apply overly formalistic interpretations of the Commission's jurisdiction. *See infra* ¶¶ 16-17 (finding complaint-based standing for individuals subject to pass-through costs from utility); *Gallatin Natural Gas Co. v. Public Serv. Comm'n*, 79 Mont. 269, 291 (1927) (finding the subsidiary regulated public utility and up-stream parent "are in effect the same" company for the purpose of regulation); *State ex rel. Thacher,* 62 Mont. 97, 102 (1921). These cases, read alongside Mont. Code Ann. § 69-3-101, suggest that the Commission should consider the end-users of a service as constituting a plurality of customers, regardless of whether Boyne serves as an intermediary. Under this interpretation, Shoshone's members alone would qualify ABACO as a public utility. On these two grounds, ABACO has a plurality of customers meeting the furnishing of service to "other persons, firms, associations, or corporations" requirement under Mont. Code Ann. § 69-3-101.

13. Finally, the Montana Supreme Court has admonished the Commission that the term public utility is "generally understood in common parlance." *State ex rel. Thacher,* 62 Mont. 97, 102, 204 P. 378 (1921). In that case, the Commission attempted to take jurisdiction over an irrigation company. The court found that an irrigation company as a public utility conflicted with common sense because irrigation companies were already regulated by another governmental body and the public utility definition of "water for business" didn't accurately reflect the characteristics of an irrigation company. *Id.* at 102-04. ABACO is a propane service provider that closely resembles all of the other underground propane distribution systems the Commission currently regulates. *See* Response Brief, pp. 3-4 (Nov. 25, 2013). Therefore, the

Commission can reasonably conclude, based on a common understanding of what a public utility is and the facts alleged in Shoshone's complaint, that ABACO meets the requirements of Mont. Code Ann. § 69-3-101.

Shoshone's Standing to File Its Complaint

14. ABACO argues that Shoshone does not have standing to bring its complaint against ABACO before the Commission. In making this argument, ABACO relies on two sources of authority: (1) Mont. Code Ann. § 69-3-321(1), which requires a complainant to be "directly affected" by the defendant's actions and (2) *Williamson v. Mont. PSC*, 2012 MT 32, 364 Mont. 128, 272 P.3d 71 which defines "directly affected." In this case, the Montana Supreme Court made six separate findings in regard to complainant's standing before the commission. The court denied standing for claims of five types of injury:

- The court denied standing for injury of "the general property taxes paid by the Complainants . . . used by the used cities and counties to help defray the costs of street lighting."
- The court denied standing for the injury of being directly affected "by NWE inferior service from lights illuminating roadways they drive on."
- The court denied standing to Complainants as "third-party beneficiaries of various street lighting contracts which their local governments entered into with NorthWestern."
- The Court denied standing based on the Montana Constitution in that the complainants have the right to obtain a speedy remedy for their injuries.
- The court denied "standing to protect the rights of others in the general rate paying public who do not have the scientific or ratemaking expertise to bring an action on their own behalf."

Williamson, ¶¶ 38-42.

15. However, the court did grant standing in "pass through" systems where the down-stream individual is expected pay for costs incurred through an up-steam entity:

> The statute grants standing to "persons," not just "customers," and the critical language is "directly affected," not "directly pays." Under the PSC's approach, large categories of persons could be precluded from pursuing legitimate complaints in the PSC through the mere expedient of structuring customer classes, rate classification, and billing practices such that consumers pay energy fee to an intermediary which in turn pays NorthWestern directly.

Id. at ¶ 48. This passage closely describes what is occurring between ABACO, Boyne, and Shoshone. Shoshone does not actually pay ABACO directly, but the service fees charged to

Shoshone are alleged to be passed-through from Boyne to ABACO. Complaint at p. 2. The Complaint alleges a written agreement between Boyne and Shoshone to provide propane service. *Id.* The Complaint alleges that after receiving propane from ABACO, Boyne then sells the same propane to Shoshone. *Id.* In *Williamson*, the court found "there is a sufficiently close logical, causal, or consequential relationship between (a) NorthWestern's rates and charges and (b) the taxes paid by the property owners specifically for street lighting in the street lighting district, to satisfy § 69-3-321(1)." *Williamson*, ¶ 48. Here, there is a sufficiently close logical, causal, or consequential relationship between (a) ABACO's rates and charges and (b) the fees paid by Shoshone to Boyne for the propane service furnished through ABACO's propane distribution system to satisfy § 69-3-321(1).

16. Shoshone's alleged injury is discrete and traceable enough that it is not deficient in the way the general taxes injury was found to be in *Williamson*. *Cf. Williamson*, ¶ 38 ("[I]f some of the general property taxes paid by Complainants are used by the cities and counties to help defray the costs of street lighting, paying general property taxes does not, in itself, establish a sufficiently close logical, causal, or consequential relationship"). Shoshone identifies a propane delivery agreement between ABACO and Boyne and the costs associated with this agreement paid by Shoshone. Complaint at p. 2. Since Shoshone's Complaint alleges a specific pass-through charge attributable to ABACO, the Commission finds the standing requirements of Mont. Code Ann. § 69-3-321(1) and *Williamson* are satisfied here.

Procedural Concerns

17. The Commission is concerned that many of these arguments, which require addressing, have only now been fully and clearly raised on reconsideration. ABACO has significantly changed its legal theory and perspective on reconsideration by abandoning its franchise rights enforced by estoppel theory and has instead adopted the framework of Mont. Code Ann. § 69-3-101. *See* Or. 7393, ¶¶ 25-28. The Commission understands unique circumstances give greater credence to permitting something that would otherwise appear to be procedural misstep. *See* Substitution of Counsel, (Feb. 5, 2015). The Commission will be reluctant to offer reconsideration on this type of new argumentation without extenuating circumstances in the future.

Lack of Record Evidence to Set Rates

18. ABACO raises an important point that the Commission lacks record evidence at this point in the proceeding. "The Commission erroneously relied on findings that were not supported by any witness testimony in the record. First, the Commission concluded ABACO has not enacted restrictive memberships to exclude the general public. This statement is not supported by any witness testimony and is disputed by the Second Affidavit of Mr. Tschider." Mot. to Reconsider at p. 4. As mentioned earlier, an order on a motion to dismiss need not be based on record evidence. *Supra* ¶¶ 9-10. However, the Commission's initial order includes a requirement that 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." Or. 7393 at pp. 8-9. The Commission now recognizes that this proceeding lacks sufficient evidence, is only at the motion to dismiss stage, and therefore a preservation of rates should not be required. *See* Mont. Code Ann. §§ 69-2-302, 2-4-623. Since this determination is premature, this portion of Order 7393 is reconsidered and removed.

Order

THEREFORE, based upon the foregoing, it is HEREBY ORDERED as follows:

19. ABACO's Motion to Reconsider Order on Motion to Dismiss is hereby reconsidered and amended with respect to additional legal reasoning which was required on the issues of *Lockwood* and standing.

20. The Commission removes the portion of the Order which states "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." Or. 7393 at pp. 8-9.

21. The Commission continues to deny ABACO's Motion to Dismiss Shoshone's Complaint in this Docket.

DONE AND DATED this 24th day of April, 2015, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BRAD JOHNSON, Chairman

TRAVIS KAVULLA, Vice Chairman

KIRK BUSHMAN, Commissioner

ROGER KOOPMAN, Commissioner

BOB LAKE, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)