

Service Date: December 22, 2016

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. 7393c
Complainant,	)	
	)	
v.	)	
	)	
ABACO ENERGY SERVICES, LLC	)	
a North Dakota Limited Company,	)	
	)	
Defendant.	)	

**FINAL ORDER**

APPEARANCES

FOR SHOSHONE CONDOMINIUM HOTEL OWNERS ASSOCIATION:

J. Robert Planalp, Landoe, Brown, Planalp & Reida, P.C., 27 N. Tracy, Bozeman, MT 59771-0001.

FOR ABACO ENERGY SERVICES, LLC

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FOR THE INTERVENORS:

*Montana Consumer Counsel*

Jason T. Brown, 111 North Last Chance Gulch, Suite 1B Helena MT 59620-1703.

*Boyne USA, Inc.*

Mike Green and D. Wiley Barker, Crowley Fleck PLLP, 900 N. Last Chance Gulch, Suite 200, Helena, MT 59601.

BEFORE:

Brad Johnson, Chairman  
Travis Kavulla, Vice Chairman  
Kirk Bushman, Commissioner  
Roger Koopman, Commissioner  
Bob Lake, Commissioner

COMMISSION STAFF:

Will Rosquist, Administrator, Regulatory Division  
Justin Kraske, Administrator, Legal Division  
Jeremiah Langston, Staff Attorney  
Joel Tierney, Utility Engineer/Pipeline Safety Program Manager

### PROCEDURAL HISTORY

1. On September 30, 2013, Shoshone Condominium Hotel Owner's Association ("Shoshone") filed a Complaint asking the Montana Public Service Commission ("Commission" or "PSC") 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. Shoshone's Response Brief was filed on December 12, 2013. 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." Order 7393 pp. 8–9 (Feb. 18, 2015).

4. On February 13, 2015, a Senate Bill 321 was introduced in the Montana Legislature that would have specially exempted ABACO from the Commission's jurisdiction. *See* S.B. 321, 2015 Leg., 64th Reg. Sess. (Mont. 2015). 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. The Commission temporarily suspended this proceeding while this Bill was pending in the Montana Legislature. The Bill was passed by the Montana Senate and House but ultimately was vetoed by the Governor. *See* Veto Message of Governor Steve Bullock of Senate Bill 321 (Apr. 8, 2015).

5. On March 13, 2015, 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 7393 in Order 7393a. Order 7393a removed the requirement that ABACO must preserve current rates for the propane system for 12 months. *See* Order 7393a at ¶ 20.

6. On May 20, 2015, the Commission issued a Notice of Opportunity to Intervene in Complaint Proceeding. The Montana Consumer Counsel and Boyne USA, Inc. were granted intervention on June 11, 2015.

7. On June 12, 2015, ABACO filed a Petition for Judicial Review with the Montana First Judicial District Court seeking to reverse two orders of the Commission. On July 15, 2015, the Commission filed a Motion to Dismiss concerning ABACO's Petition for Judicial Review. The Commission's Motion to Dismiss was granted on October 28, 2015, allowing the Commission to proceed with Shoshone's Complaint. *Abaco Energy Services, LLC v. Mont. Pub. Serv. Comm'n*, ADV-2015-424, Order on Respondent's Mot. to Dismiss, 7 (Mont. 1st Jud. Dist. Ct. Oct. 28, 2015).

8. On November 18, 2015, the Commission issued Procedural Order 7393b setting deadlines for discovery, testimony, prehearing memorandum, and a hearing date. A hearing was held on July 11, 2016. ABACO and Shoshone filed post hearing briefs.

9. ABACO also requested to file a late filed exhibit concerning communications between ABACO and the Shoshone Board. ABACO filed portions of this communication on July 26, 2016. Shoshone filed a Motion to Strike this late filed exhibit, which was fully briefed by the parties.

## MISCELLANEOUS

### **Shoshone's Motion to Strike ABACO's Late Filed Exhibit**

10. Near the end of the second day of the hearing, Counsel for Shoshone reexamined Murray Morgan for the purposes of introducing a letter that purported to prove ABACO's position on the disclosure of a particular contract. Hr'g Tr. at 379:19–380:17 (Jul. 11–12, 2016). ABACO objected to the introduction of that letter and the Commission sustained that objection because the letter was not complete and it could not be properly contextualized. Hr'g Tr. at 381:1–382:9.

11. Stacy Tschider was then recalled as a witness to respond to Mr. Morgan's testimony, as characterized by ABACO's Counsel, that "Shoshone never received that [letter] from Mr. Tschider and tried to impeach and impugn [Mr. Tschider's] integrity and his sworn testimony that he actually sent that letter." Hr'g Tr. at 387:14–17. Mr. Tschider testified that he would attempt to locate an email from September 2012 to rebut Mr. Morgan's testimony. Hr'g

Tr. at 385:1–17. The Commission allowed ABACO to file this email as a late filed exhibit. After examining his computer, “Mr. Tschider was unable to locate the email he sent to Mr. Orsello . . . .” ABACO Late Filed Ex., 2 (Jul. 26, 2016). Instead, ABACO provided the following information as ABACO Late Filed Exhibits 1 & 2: “Su-Lin Tschider was able to locate a copy of an email showing she forwarded ABACO’s September 28, 2012 letter to Barbara Rooney at Boyne, and Mr. Tschider was able to locate a copy of an email exchange he had with Ms. Rooney in November 2012 in which he references other emails and phone calls he placed to Mr. Orsello.” *Id.*

12. Shoshone filed a Motion to Strike the late filed exhibit on August 2, 2016, which was fully briefed by the parties. The Commission finds that ABACO’s late filed exhibit is inadmissible. Commissioner Koopman, acting as Presiding Officer, had previously prevented Shoshone from submitting incomplete correspondence. Similarly, ABACO’s letter is inadmissible because the Commission is incapable of putting it into proper context and it lacks proper foundation.

#### **DISCUSSION AND FINDINGS OF FACT**

13. Shoshone Condominium Homeowner’s Association is a homeowners association made up of the unit owners of the Shoshone Condominium Hotel. Test. of Murry Morgan, 3 (Feb. 16, 2016). The hotel is a 94 unit condominium operated at the base of Lone Mountain in the Mountain Village at Big Sky. *Id.* It was built in approximately 1989 by Boyne USA, and the individual units were marketed and sold as condominiums. *Id.* Initially, Boyne USA acted as the Condominium’s property manager and also its leasing agent. *Id.* The following witnesses provided prefiled testimony on behalf of Shoshone: Murray Morgan, who is the President of Shoshone and is on the Board of Directors; Robert Orsello, who is a Shoshone unit owner and has been a member of the Board of Directors since 2011; Matthew Paine, who is the President of the Homeowner’s Association for the Village Center in Big Sky, Montana; and Diane Bartzick, who is on the Shoshone Board of Directors.

14. ABACO Energy Services, LLC is a North Dakota L.L.C. that has been in business since 2007. Test. of Stacy Tschider, 1:28–8 (Mar. 29, 2016). ABACO is owned by Stacy Tschider, Su Lin Tschider, Jeffery Jonson, and Deborah Jonson. *Id.* ABACO owns the tank farm and associated equipment, distribution main and service pipes and meters for the propane

distribution system located in the Village Center in Big Sky. Test. of Kevin Shutlesworth, 2:15–3:13 (Mar. 29, 2016). Liquid propane is received via tank truck from a contracted supplier. *Id.* The tank farm has two 30,000 gallon storage tanks. *Id.* The distribution system consists of 18,400 feet of plastic mains through 83 services supplying 228 meters. *Id.* ABACO does not own any assets downstream of these meters. *Id.* The propane distribution system was originally constructed in 1996 by the Montana Power Company. *Id.* at 1:23–2:12. NorthWestern Energy acquired the system from the Montana Power Company around 2002. *Id.* ABACO purchased the system from NorthWestern Energy in 2007. *Id.* The following witnesses provided prefiled testimony on behalf of Shoshone: Stacy Tschider, who is the President of ABACO; Su-Lin Tschider, who is the Chief Financial Officer of ABACO; Jeffrey Jonson, who is the CEO of ABACO; and Kevin Shuttlesworth, who is a technical consultant for ABACO and the Gas and Electric Meter Shop Supervisor for NorthWestern Energy.

15. Boyne USA, Inc. (“Boyne”) is the owner of Big Sky Resort and manages the Summit Hotel, the Village Center Condominiums, and the Snowcrest Lodge. Hr’g Tr. 164:14–165:2. Boyne also negotiated an Agreement to Provide Propane Service with ABACO in July of 2007. Test. of Jeffrey Jonson, Ex. 2 (Mar. 29, 2016) [hereinafter *2007 Agreement to Provide Propane Service*]. Annually, after ABACO has conducted its request for proposal (RFP) process, Boyne will determine whether it wants to lock in a propane price or use a floating propane price with ABACO. Hr’g Tr. at 164:14–165:2. Pursuant to the Agreement to Provide Propane Service, Boyne may choose contract with another provider of propane to supply the propane commodity. 2007 Agreement to Provide Propane Service § 7(c). If Boyne did choose to contract with another propane supplier, it would still be obligated to pay ABACO for operation and maintenance and distribution charges until June 2027. *Id.*

16. Barbara Rooney, Senior Vice President of Lodging, Spa, and Owner Services for Boyne Resorts, testified about the importance of the ABACO propane to the Big Sky Mountain Village area: “There is a reason why we have a propane plant. Right. It makes a lot of sense for the Mountain Village from a safety standpoint, from providing consistent service, providing the vaporizing opportunity which, therefore, the systems run better and more efficiently.” Hr’g Tr. at 188:14–19. She went on to further describe the public interest benefits of the propane system from Boyne’s perspective:

It's a complex system. It's an expensive system to operate. We've never been without propane and I can't say that for -- we have another little hotel down actually in the canyon that is a single standing hotel and it's a very different situation and we've run out of propane there and that doesn't work out so well. Right? It doesn't work for the guests, it doesn't work for the staff. It's not a good situation. So never have we had that scenario. We've have consistent service and there is value to that also. We run a pretty massive resort and service is very important, and it's a complex system.

Hr'g Tr. at 191:12–24. Ms. Rooney did not provide any provide any prefiled testimony, but authored data responses and was available for questioning at the hearing.

17. The Montana Consumer Counsel did not submit any prefiled testimony or offer any live witnesses, but was present for questioning witnesses at the hearing.

18. The parties raised three substantive issues: (1) whether Shoshone has standing under Mont. Code Ann. § 69-3-321 to bring its Complaint against ABACO; (2) whether ABACO is a public utility pursuant to Mont. Code Ann. § 69-3-101; and (3) whether ABACO meets the group service exception to public utility status described in *Lockwood Water Users Ass'n v. Anderson*, 168 Mont. 303, 542 P.2d 1217 (1975).

### **Standing**

19. Under Mont. Code Ann. § 69-3-321, any individual or organization may file a complaint with the Commission when it is “directly affected” by any regulations, measurements, practices, or acts whatsoever affecting or relating to the production, transmission, delivery, or furnishing of heat, light, or power. In *Williamson v. Mont. Pub. Serv. Comm'n*, the Montana Supreme Court said this directly affect standard does not require the complainant to “write the check directly to NorthWestern” in exchange for the services provided. 2012 MT 32, ¶ 48, 364 Mont. 128, 272 P.3d 71. Instead, the Court said a “pass-through” of costs associated with street-lighting from NorthWestern to property owners in a street lighting district are sufficient to meet this directly affected standard. *Williamson*, ¶ 48. In making this finding, the Court concluded “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), MCA.” *Id.*

20. ABACO argues that Shoshone is not directly affected based on evidence that Shoshone and ABACO do not have a history of direct, face-to-face interactions. ABACO Resp.

Br., 3 (Aug. 29, 2016). For instance, ABACO points out that Shoshone has no direct financial obligations to ABACO (Hr'g Tr. at 227:3–4); Mr. Orsello has never directly contacted ABACO (Hr'g Tr. at 154:4–9); the agreement to provide propane is between Boyne and ABACO and not ABACO and Shoshone (Hr'g Tr. at 171:14–22); the propane delivered under contract is provided to Boyne and not Shoshone (Hr'g Tr. at 175:23–176:1); Boyne states it was never acting on behalf of any other party (Hr'g Tr. at 175:8–12); and ABACO is not a party to any contract between Boyne and the Shoshone. Hr'g Tr. at 174:3–9, 63:14–17, 64:3–6, 175:2–7. ABACO also argues there is no billing relationship with Shoshone. ABACO Resp. Br. at 4. As an example of this, ABACO cites to evidence that ABACO does not send invoices to Shoshone (Hr'g Tr. at 247:13–19, Test. of Su-Lin Tschider, 2:14–19 (Mar. 29, 2016), Hr'g Tr. at 58:18–20); instead, ABACO sends Boyne invoices and Boyne pays ABACO for propane service (*id.*); and Shoshone has never issued a check to ABACO. Hr'g Tr. at 58:21–23. In *Williamson*, the Montana Supreme Court explicitly said failure to “write the check directly to NorthWestern for the street lighting bill” would not automatically defeat standing under the directly affected standard. *Williamson*, ¶ 48. That fact there are no face-to-face interactions or exchange of invoices and checks between ABACO and Shoshone should not destroy Shoshone’s standing in this case.

21. ABACO argues that it has no role in how Boyne allocates propane usage and costs to Shoshone. ABACO Resp. Br. at 4. (citing Hr'g Tr. at 153:5–10, 174:23–175:1, 176:5–7; Test. of Su-Lin Tschider at 2:11–13). Standing is not defeated by a service provider’s inability to set the rates of end users. As long as there is a traceable pass through a costs to end users, a service provider has effectively set the rates for that end user whether it was aware of this fact or not:

Taking the Grubas' and the Barsantis' well-pleaded allegations as true, they allege that they live in street lighting districts and that they have been assessed and paid taxes for street lighting services in these districts as shown by separate lines on their property tax bills (which they have attached to their pleadings). These allegations are sufficient to establish that the Grubas and the Barsantis are "directly affected" by NorthWestern's rates and charges under § 69-3-321(1), MCA.

*Williamson*, ¶ 49. NorthWestern had no role in determining how street lighting services were allocated to the Grubas’ and Barsantis’ property tax bills. Regardless, the Montana Supreme Court found that the Grubas and Barsantis could bring a complaint against NorthWestern.

22. ABACO claims that it was unaware Shoshone was an end user of its propane before this Complaint was filed. ABACO Resp. Br. at 3–4 (citing Hr’g Tr. at 175:2–7, at 257:21–258:4, 375:8–13). These claims are discredited by a September 28, 2012, letter from Stacy Tschider acknowledging Shoshone as one of ABACO’s customers:

Dear Shoshone Members/Board:

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*.

SCHOA Ex. 1-6 (emphasis added). ABACO acknowledges that it provides propane to a meter location near Shoshone as directed by Boyne under its services agreement with Boyne. ABACO Resp. Br. at 6 (citing Hr’g Tr. at 175:23–176:1). ABACO’s invoice to Boyne for this particular meter calls this the “Shoshone Lodge Propane Meter.” SCHOA Ex. 1-2. In response to Data Request ABACO-025, Boyne stated:

ABACO is aware that propane delivered to the meter is used in the Shoshone Condominium Hotel. Annually, ABACO provides price quotes from propane supplier in order to give users of the propane the option of “locking in” a price per gallon or floating with the market. ABACO was aware that the “lock” and “float” options were presented to the SCHOA board for discussion and decision, and it was aware that multiple condominium interest were present in the Shoshone Condominium Hotel.

DR ABACO-025 (Feb. 1, 2016). Based on this evidence, the Commission finds that ABACO knew end users were being provided some benefit from its propane service in the Shoshone Condominium Hotel in advance of this Complaint.

23. ABACO claims there is an intermediary that prevents the Commission from finding that ABACO is directly affected. ABACO Resp. Br. at 5–6. For instance, ABACO points out that Shoshone is obligated by its Home Owner Association declarations and bylaws to provide utility services to the unit owners (Hr’g Tr. at 126:1–6, 125:22–23, 126:13–15); the Shoshone Board of Directors makes all assessments of costs to unit owners (Hr’g Tr. at 47:7–15, 57:16–21); Shoshone owns all the infrastructure from the outlet of that meter to the boiler house<sup>1</sup> (Hr’g Tr. at 50:23–51:15, 52:7–53:7); Boyne operates the boilers, but Shoshone believes, as a legal matter, that it owns the boiler house (Hr’g Tr. at 54:3–5, 92:21–93:3); ABACO is not

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<sup>1</sup> Notably, not all of the pipes in the 180 degree loop attached to the boiler system are owned by Shoshone; some of these pipes are directed to Yellowstone Conference Center, which is not owned by Shoshone. Hr’g Tr. at 52:19–53:7.

responsible for fixing problems on Shoshone's side of the system (Hr'g Tr. at 55:21–23, 35:11–12, 57:10–14); and the propane delivered to Boyne is then used to heat the boilers operated by Boyne, which produces hot water that is disbursed through the Shoshone Hotel and into the individual units. Hr'g Tr. at 47:17–25, 48:22–24. The Commission agrees with ABACO that here are intermediaries between ABACO and the end users at Shoshone. The Commission, however, has been instructed not to interpret Mont. Code Ann. § 69-3-321(1) in a way that “large categories of persons could be precluded from pursuing legitimate complaints in the PSC through the mere expedient of structuring customer classes, rate classifications, and billing practices such that consumers pay energy fees to an intermediary which in turn pays NorthWestern directly.” *Williamson*, ¶ 48. Instead, this statute contemplates a “pass-through” mechanism under which “a sufficiently close logical, causal, or consequential relationship between” the service provider's rates and charges and the costs incurred by the end user. *Id.*

24. The Commission finds that neither Shoshone nor Boyne earn a profit through this pass-through mechanism and that ABACO's rates and charges are sufficiently traceable to end users. Ms. Rooney indicated through an email that Boyne does not add any additional expenses to ABACO's operation and maintenance, distribution, and per gallon propane charges. SCHOA Ex. 1-1. Shoshone provided quarterly billings from Boyne that detailed Shoshone responsibility of propane expenses from ABACO.<sup>2</sup> SCHOA Ex. 12-1. In response to questioning from Chairman Johnson, Ms. Rooney testified there is “100 percent pass-through” of these propane costs from ABACO to Shoshone and in this arrangement “there is not financial benefit to Boyne.” Hr'g Tr. at 187:5–19. Boyne also denied that it provides propane to the Shoshone Condominium Hotel, to the Home Owners Association, and the individual units within the Shoshone Condominium Hotel. DR ABACO-025.

25. When Mr. Morgan was asked by Chairman Johnson if “the numbers that are on the ABACO bill the same as the numbers that are on the Boyne bill that creates a straight pass-through dollar for dollar,” Mr. Morgan responded yes. Hr'g Tr. at 83:13–10. When asked by ABACO's counsel if “the HOA assesses unit owners a fee that in part pays for the propane and services that it receives, Mr. Morgan responded “[y]eah, it's a -- basically it matches whatever the bill is that we have coming in. I mean, it's a *zero balance-type expense*.” Hr'g Tr. at 57:16–21 (emphasis added). ABACO does not point to any evidence that these two intermediaries are

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<sup>2</sup> These billings are from after Boyne terminated its Management Agreement for propane to Shoshone.

imposing any markup of price incurred by the end users. Based on this information, establishing a pass-through, sufficiently traceable expense from ABACO to end users in the Shoshone Condominium Hotel, the Commission finds that Shoshone has standing to bring its Complaint against ABACO.

### **Public Utility Status**

26. In the context of the case at hand, the term "public utility" means a (1) private corporation that (2) owns, operates, or controls (3) any plant or equipment, any part of a plant or equipment (4) for the production, delivery, or furnishing of heat, light, or power in any form (5) for or to other persons, firms, associations, or corporations, private or municipal (6) in Montana. Mont. Code Ann. § 69-3-101. When examining the criteria provided in Mont. Code Ann. § 69-3-101, this case presents two questions. One, does a propane distribution system meet the criteria of being “for the production, delivery, or furnishing of heat, light, or power in any form?” Two, whether ABACO provides service “for or to persons, firms, associations, or corporations, private or municipal,” meaning, is there a plurality of customers. Separate from the statutory definition of a public utility, there is a third question of whether ABACO meets the group service exception to public utility status described in *Lockwood Water Users Ass'n v. Anderson*, 168 Mont. 303, 542 P.2d 1217 (1975).

### **Propane for the Purposes of Producing, Delivering, or Furnishing Heat, Light or Power**

27. The broad and unspecific language of heat, light or power in any form was used by the Montana Legislature to provide latitude to the Commission to be able to regulate future technologies. *See, e.g. In re Babcock & Brown Infrastructure Ltd.*, Docket D206.6.82, Order 6745e, ¶¶ 22–32 (Aug. 1, 2007) (finding the Commission has authority to approve sale and transfers based on the Commission’s broad general authority in its Enabling Act). The basic definition of a public utility provided in Mont. Code Ann. § 69-3-101 is largely unchanged from its original form enacted in 1913. *See, e.g. Gallatin Nat. Gas Co. v. Pub. Serv. Comm'n*, 79 Mont. 269, 275, 256 P. 373, 374 (1927) (providing the statutory definition of a public utility in 1927). The broad language provided in the Commission’s Enabling Act manifest the Legislature’s recognition of the complexity of the task assigned to the Commission and it would be impossible to enumerate every specific power necessary for effective utility regulation. *In re*

*Babcock & Brown Infrastructure Ltd.*, Docket D206.6.82, Order 6745e at ¶ 22. The Legislature has granted the Commission the general powers necessary to perform the specific tasks assigned to it, such as the ability to adapt to future, unforeseen technologies for delivering heat, light, and power in any form. Mont. Code Ann. § 69-3-103(1).

28. Natural gas and electricity are not specifically addressed in the statutory definition of a public utility yet are still regulated by the Commission. *Shoshone Reply Br.*, 6 (Sept. 13, 2016). 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.*, 79 Mont. at 279–80, 256 P. at 375. The Commission cannot identify a functional difference between natural gas and propane for the purposes of producing heat, light, and power that would justify a jurisdictional divide between these the two substances.

29. ABACO raises the statutes of Mont. Code Ann. § 69-3-1203(7) (enacted in 1993); Title 69, Chapter 3, Part 14, the Natural Gas Utility Restructuring and Customer Choice Act (enacted in 1997); and Mont. Code Ann. § 69-3-1501(4) (enacted in 2005), as examples of natural gas being included in other areas of Title 69. *ABACO Resp. Br.* at 13. ABACO then argues any comparison of propane to natural gas is unwarranted because natural gas is specifically mentioned in Title 69. *Id.* All of these statutes cited by ABACO were enacted well after *Gallatin Natural Gas Co.* stated natural gas is a regulated commodity under Mont. Code Ann. § 69-3-101 in 1927. Even without these ancillary sources of authority, the Montana Supreme Court was able to determine natural gas met the meaning of a public utility under Mont. Code Ann. § 69-3-101. For the purposes of deciphering the meaning of a public utility, comparisons of propane to natural gas are appropriate.

30. ABACO also attempted to exempt itself from Commission regulation in the 2015 Montana legislative session. *See* S.B. 321, 2015 Leg., 64<sup>th</sup> Reg. Sess. (Mont. 2015). The Governor vetoed this bill indicating it was the intention of the Executive for the Commission to maintain regulation over some propane systems. *See* Veto Message of Governor Steve Bullock of Senate Bill 321 (Apr. 8, 2015). Said differently, the Governor’s veto letter indicated that propane should not be categorically excluded from Commission’s jurisdiction. Instead, the Commission’s expertise should make the determination of whether a propane distribution system is within the Commission’s jurisdiction based on the facts and law before it. *Id.*

31. Other propane distribution systems currently and previously regulated by the Commission demonstrate the proposition that propane is not categorically excluded from meeting the requirements of Mont. Code Ann. § 69-3-101. *See, e.g. In re Miller Oil Company's 2016 General Rate Case*, Docket D2016.9.76 (filed Sept. 30, 2016); *In re Deactivation of Five Valleys Gas Company*, Docket 2015.3.31, Order 7414a (Aug. 26, 2015) (approving Five Valleys' deactivation as a public utility in 2015); *In re NorthWestern Energy's Application to Increase Rates and Establish an Annual Supply Tracking Mechanism for Townsend Propane*, Docket D2008.12.142, Order 6968b (Sept. 11, 2009); *In re Energy West Montana's General Rate Case*, Docket D2010.9.90, Order 7132c ¶ 6 (Nov. 17, 2011) (summarizing EWM's regulated propane service in Hardy Creek and Cascade). ABACO argues that when the Commission "has done so in limited instances in the past, where those companies placed their infrastructure in public right of ways and served each residence and business in their service area does not mean the Commission has authority to do now what its enabling statutes do not allow it to do." ABACO Resp. Br. at 13.

32. This argument ignores that the Commission cannot gain subject matter jurisdiction outside of its statutes.<sup>3</sup> *Great N. Utils. Co. v. Pub. Serv. Comm'n*, 88 Mont. 180, 203, 293 P. 294, 298 (1930) ("the Commission is a creature of, owes its being to, and is clothed with such powers as are clearly conferred upon it by the statute"). "Subject-matter jurisdiction can never be forfeited or waived . . . [and] cannot be conferred by the consent of a party." *Thompson v. State*, 2007 MT 185, ¶ 28, 338 Mont. 511, 520, 167 P.3d 867, 874. "Courts of limited jurisdiction have only such power as is expressly conferred by statute." *Id.*, ¶ 24. "A party can never waive or consent to subject matter jurisdiction where there is no basis for the court to exercise jurisdiction." *Harris v. Smartt*, 2003 MT 135, ¶ 11, 316 Mont. 130, 132-33, 68 P.3d 889, 891 (citing *Balyeat Law, PC v. Pettit*, 1998 MT 252, ¶ 15, 291 Mont. 196, 967 P.2d 398).

33. The Commission already asserted that the doctrine of estoppel combined with the requirement to operate under a franchise agreement is "outdated mode of utility regulation." Order 7393 ¶ 25–28. "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,

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<sup>3</sup> Personal jurisdiction, however, can be conferred by a party's actions before a tribunal. *Milanovich v. Schnibben*, 2007 MT 128, ¶ 10, 337 Mont. 334, 160 P.3d 562.

36, 214 P. 608, 609 (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."

*Id.*, 67 Mont. at 36, 214 P. at 609 (quoting *State ex rel. Billings v. Billings Gas Co.*, 55 Mont. 102, 112, 173 P. 799, 801 (1918)). 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 franchises as a contract between a city and a utility. *Billings*, 67 Mont. at 35–37, 214 P. at 608–09.

34. The propane systems in Seeley Lake, Culbertson, Hardy Creek, Cascade, and Townsend could only come under the Commission's jurisdiction by virtue of its subject matter jurisdiction provided in Mont. Code Ann. § 69-3-101. *See also State ex rel. Thacher*, 62 Mont. 97, 102, 204 P. 378, 379 (1921) (encouraging the Commission to interpret the term public utility in a way that is "generally understood in common parlance"). The Commission finds that ABACO's distribution of propane meets the requirement of producing, delivering, and furnishing heat, light, and power in any form under Mont. Code Ann. § 69-3-101.

### **Plurality of Customers**

35. ABACO has a total of 231 meters on its system. DR PSC-001(b). Eighteen fall within the contract with Boyne. *Id.* "The remaining 213 meters are held by individual unit owners . . . ." *Id.* These customers are located in the following developments:

Cedar Creek	72
Powder Ridge	89
Stillwater Condominiums	41
Elkhorn Creek	10

*Id.* (The Lodge has been disconnected at the request of the customer.)

36. ABACO also serves a significant number of end users who have Boyne as an intermediary. Shoshone has 94 units that constitute end users of the propane that the ABACO system distributes. *Test. of Murray Morgan*, 3 (Feb. 16, 2016); Hr'g Tr. at 74:19. The Montana Supreme Court has provided guidance to the Commission that it should look practically at these

issues rather than adhering to strict formality. *See, e.g. Williamson*, ¶ 48. Although Shoshone customers only receive a small amount of propane directly, the building has three boilers which heat the 94 units. Hr’g Tr. at 78:17–21. For safety purposes, ABACO acknowledges it is aware of Shoshone customers. Hr’g Tr. at 373:2–6. ABACO also sent a September 28, 2012, letter to Shoshone’s board acknowledging Shoshone’s customers. SCHOA Ex. 1-6. Boyne has stated that ABACO was aware of Shoshone as end users before this proceeding. DR ABACO-025.

37. There are other units in which Boyne acts as an intermediary and the end users are not fully accounted for by ABACO’s records. Boyne has a propane cost sharing agreement with the residential unit owners in the Snowcrest Condominium. DR SCHOA-029. Boyne provides ABACO’s invoices to the Summit and Village Center Associations. *Id.* Boyne also provides invoices for a portion of the Powder Ridge residential condo units. *Id.* These data requests do not detail the precise number of end-users with Boyne as an intermediary. ABACO states that Boyne’s 18 meters account for 80% of its total propane volume and these two hundred and thirteen meters account for remaining 20% of propane volumes. Assuming a similar usage of propane for the 80% allocated to Boyne, there could be up to 852 customers behind Boyne as an intermediary ( $(213/.2) \times .8 = 852$ ). Boyne likely is taking a large portion of this propane volume as they are a customer with significant propane needs. Hr’g Tr. at 191:22–24. The Commission does not place much weight on this number because it is derived from less certain methods, but this information is indicative that ABACO is capable of providing enough propane in the Big Sky area to meet the needs of up to 1,065 individual residential customers ( $852 + 213 = 1,065$ ).

38. The Commission finds that ABACO has 308 known end users on its system (213 individual meters + 94 Shoshone units + Boyne) and these 308 users are sufficient to find that ABACO has a plurality of customers. Compare this to Anaconda Job Corps that has only one customer with one meter and is not economically regulated by the Commission. Hr’g Tr. at 331:24–332:2.

### **Group Service Exception to Public Utility Status**

39. States often will provide an exception of public utility regulation to a utility service provider when that service provider is a group of customers serving themselves. The Montana Supreme Court recognized that exception in *Lockwood Water Users Ass’n*, which concerned a water utility that was created as “a voluntary nonprofit corporation organized for the

purpose of supplying water to its members.” 168 Mont. at 305, 542 P.2d at 1218. “To finance the Association, memberships were sold for \$ 50.” *Id.* The Association was formed as “a nonprofit corporation organized for the purpose of supplying water to members only.” *Id.*

40. ABACO was asked in Data Request PSC-003 if has enacted any of these restrictions identified in *Lockwood Water Users Ass’n*. ABACO responded that it is a for profit corporation organized as a North Dakota limited liability company. DR PSC-003(a); Hr’g Tr. at 268:16–18. It stated that no documentation exists proving that its service “is rendered only to stockholders or members who share the costs of operation.” DR PSC-003(b); Hr’g Tr. at 265:12–266:10. None of the customers of ABACO have an ability to exercise voting or franchise rights as to how the system is operated. Hr’g Tr. at 266:11–15.

41. ABACO claims it confines its service to its own stockholders or members and does not serve or hold itself out as willing to serve the public. ABACO Resp. Br. at 14–18. ABACO says the Commission has overemphasized the language identified above and has not given sufficient attention to the following language:

The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

*Id.* at 15–16 (quoting *Lockwood Water Users Ass’n*, 168 Mont. at 308, 542 P.2d at 1220).<sup>4</sup> The Commission finds that ABACO is not and has no way of defining the actual end users of their service. ABACO has no ability to prevent the sale of units that are serviced by their system. Hr’g Tr. at 271:6–8. ABACO sometimes does not know who actually occupies a unit attached to one of its meters: “If a Cedar Creek unit has an owner and has ten different renters in a cycle of the seven years, they may or may not have the renter put that service in their name.” Hr’g Tr. at 356:21–24. Since new users on the system are never required to engage in the process of becoming a member, they no way to know that they are supposedly being brought into a propane system that is not serving the public and is not subject to Commission regulation.

42. It also appears that the number of properties serviced by ABACO are not constant and are growing. ABACO claims that it “has not added any customers other than those already

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<sup>4</sup> ABACO also quotes the following language from *Lockwood Water Users Ass’n* in making this point: “whether such an organization or group is in fact a public utility in this respect is the factor of serving or willingness to serve the entire public within the area . . . .” *Id.* at 15 (citing *Lockwood Water Users Ass’n*, 168 Mont. at 309, 542 P.2d at 1220).

on the system when it acquired the system.” ABACO Resp. Br. at 14. ABACO acknowledged in its testimony that it added new customers in Boyne’s Powder Ridge subdivision. Test. of Jonson at 1–2; Test. of Su-Lin Tschider at 3; Test. of Stacy Tschider at 4–5. Data requests and testimony received at hearing show that ABACO, at the request of Boyne, also added 15 units to its system in the Homestead Chalet development in 2015. Hr’g Tr. at 348:3–351:4; DR SCHOA-007(a).

43. ABACO claims that all of these properties have been developed by Boyne and then some of these properties have been transferred from Boyne to third parties. DR PSC-001(a). Ms. Rooney indicated this was not the case. The Cedar Creek and Elkhorn developments were never owned by Boyne. Hr’g Tr. at 178:4–7. As for Powder Rider, Boyne developed the property and then turned over the property to a homeowner association. Hr’g Tr. at 178:16–21. This is how Boyne has developed many of these similar properties: “typically what happens is as soon as a complex of that nature is developed and sold, it’s turned over to the homeowners association in terms of how they handle their services.” Hr’g Tr. at 178:11–15.

44. Shoshone also provides evidence that Boyne has plans to expand the village area. SCHOA Ex. 1-4; DR SCHOA-34. This plan include 290 units of residential condominiums, town homes, and commercial uses north of Huntley Lodge and 450 units of similar mix northwest of Huntley Lodge. DR SCHOA-34 at p. 3. Boyne’s expansion plan states, “NorthWestern Energy, ABACO and 3 Rivers Communications are each responsible for the engineering and installation of their facilities, while the applicant at the site development stage will be responsible financially.” *Id.* at p. 10. Boyne offered ABACO an opportunity to respond to this expectation, but ABACO provided no response either affirmatively confirming or denying that it would provide these services. *Id.* Other service providers did provide a response. *See, e.g. Id.* at App. VI-E (“Republic Services will be able to provide both residential and commercial garbage service to all planned additions within the area encompassed in this development plan”).

45. ABACO may not have complete control to limit the size of its system because of Boyne’s influence over its business practices. In reference to the Homestead Chalets, Ms. Tschider testified, “In order to keep our relationship with Boyne we said, ‘We will do these but that’s it for now,’ because of what we’re being held to right now.” Hr’ Tr. at 350:8–11. ABACO indicated this proceeding has affected its business decisions regarding expansion. Hr’g Tr. at 358:21–359:20. Boyne’s data responses seem to confirm this: “[h]istorically, ABACO agreed to directly bill and serve owners of Powder Ridge residential condo units. Since initiation of this

docket, however, ABACO has refused to accept or transfer of utility accounts for residential owners of Powder Ridge Units.” DR SCHOA-029.

46. Furthermore, when Boyne acts as an intermediary and enters into contracts for end users on the system, it states it is not acting on behalf of any other party. Hr’g Tr. at 175:8–12. In these situations when Boyne serves as an intermediary, the Commission does not presume that Boyne is acting in a manner that would negate these end users’ public status. Based on the forgoing evidence, the Commission finds that ABACO is serving and willing to serve the public.

47. Other jurisdictions have further elaborated on determining whether a provider is supplying to “the public as a class,” rather than “only particular individuals.” *See In re Kimball Lake Shores Association*, 1980 Me. PUC LEXIS 1, \*13 (ME PUC Jan 31, 1980).<sup>5</sup> In this decision, the Maine Public Utility Commission found “courts and commissions have isolated a number of factors, no one of which is conclusive, but which, taken together, provide a calculus for measuring the nature of the enterprise.” *Id.* at \*29. Those seven factors are: (1) The size of the undertaking; (2) Whether the enterprise is operated for profit; (3) Whether the system is owned by the user; (4) Whether the terms of service are under the control of its users; (5) The manner in which the service is offered to prospective users; (6) Limitation of service to organization members or other readily identifiable individuals; and (7) Whether membership in the group is mandatory. *Id.* at \*29–37.

48. Factor 1: The size of the undertaking. This propane distribution system is reasonably large; the ratio of customers to propane sales by volume suggests that ABACO is capable of servicing over a thousand residential customers. *Supra* ¶ 37. The Maine Commission notes this factor is relatively unimportant because “a bona fide public utility may serve very few customers while a genuinely private enterprise may serve many.” *In re Kimball Lake Shores Association*, \*30.

49. Factor 2: Whether the enterprise is operated for profit. ABACO has indicated that it is a for profit corporation. The Maine Commission states “[a]n intended lack of profit . . . does indicate that the sole purpose of the enterprise is to confer service benefits upon the system’s users rather than to provide economic benefits to the systems owners.” *Id.* at \*30–31.

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<sup>5</sup> The Maine Public Utility Commission’s decision in *Kimball Lake Shores Ass’n* cites to *Lockwood Waters Users Ass’n*, and there is considerable overlap of language and concepts in the two cases. *See In re Kimball Lake Shores Association*, \*19.

50. Factor 3: Whether the system is owned by the user. ABACO's system is in not owned by the users. ABACO is a North Dakota limited liability company owned by Stacy Tschider, Su-Lin Tschider, Jeff Jonson, and Deb Jonson. DR PSC-003(a). This factor is important "because it establishes a substantial identity of interest between the enterprise and its customers," and "the customer/owner attains a definite identity that differentiates him from the public in general." *In re Kimball Lake Shores Association*, \*31–32.

51. Factor 4: Whether the terms of service are under the control of its users. The terms of ABACO's service are not under the control of its users. This factor is on considerable importance because:

If the users overcharge themselves they have harmed none of the public and may return their money to themselves if they wish. If they undercharge themselves on a rate that is less than just and reasonable they must make up the deficit if they wish the system to continue to operate effectively.

*Id.* at \*33. Stacy Tschider testified that customers have no ability exercise franchise or voting rights over the operation of ABACO. Hr'g Tr. at 266:11–15. Ms. Rooney testified Shoshone has no control over the agreement entered into between Boyne and ABACO. Hr'g Tr. at 171:14–22.

52. Factor 5: The manner in which the service is offered to prospective users. "Courts that have considered this factor have disagreed as to its consequences." *In re Kimball Lake Shores Association*, \*34. The Maine Commission then concludes, "[t]his factor cannot be accorded a great deal of weight . . . because it is clearly possible to purchase membership in a system owned and controlled by the residents of a particular subdivision or area, and which would not be devoted to the public use." *Id.* at \*35. ABACO has indicated that its service is provided by permission only. Test. of Stacy Tschider at 5:20–22. However, ABACO does not have control over new customers who purchase units already serviced by the propane system. Hr'g Tr. at 271:6–8, 356:21–24. Boyne can request that additional properties be served by the propane system. Hr'g Tr. at 348:3–351:4. ABACO has indicated it may be more inclined to add additional developments after this litigation is over. Hr'g Tr. at 358:21–359:20. Properties owned by Boyne can become their own entity and then become independent customers of ABACO. Hr'g Tr. at 178:11–21.

53. Factor 6: Limitation of service to organization members or other readily identifiable individuals. "Courts and Commissions have generally found that a system established to serve a particular group of individuals, such as a subdivision or a trailer park or

members of a co-op, is private because service is limited only to those who are members of the group or residents of the area.” *In re Kimball Lake Shores Association*, \*35-36. As noted above, there is considerable difficulty in differentiating the public from users on ABACO’s system. Other than living in units served by ABACO, there are no identifiable characteristics to this group which would clearly demark these people from the public. ABACO’s system spans across many different developments like Cedar Creek, Powder Ridge, Stillwater Condominiums, and Elkhorn Creek. DR PSC-001(b). ABACO also provides service to developments like Shoshone, the Summit Hotel, the Village Center Condominiums, and the Snowcrest Lodge with Boyne serving as an intermediary. DR SCHOA-029. The only limiting characteristic of ABACO’s customer base is their location in the Big Sky Village Area. This, however, cannot be the basis of identifying a limited customer base since utilities necessarily operate over a geographic area.

54. Factor 7: Whether membership in the group is mandatory.

If a customer is required to take service from a particular system, even one partially owned and controlled by him, that system has become, in effect, a monopoly. The terms of membership (including the absence of regulation) may be totally unacceptable to a customer who must nevertheless abide by those terms if he wishes to obtain service.

*Id.* at \*36-37. ABACO has indicated that no one is required to take access to this service and other customers have left the system. Hr’g Tr. at 217:22–218:7. Mr. Orsello testified that ABACO has never ever told him that he cannot install his own tank or that he must take propane from ABACO’s system. Hr’g Tr. at 156:5–16. In fall of 2015, the Lodge installed its own propane system and ended its relationship with ABACO. Test. Stacy Tschider at 6:22–24. It should be reiterated that none of these factors alone is determinative, but when “taken together, provide a calculus for measuring the nature of the enterprise.” *In re Kimball Lake Shores Association*, \*29.

55. The Maine Commission ultimately found the Kimball Shores Water Co-op was not a public utility because “[t]he system is owned entirely by its users,” “[t]he terms of the service are . . . subject to control by vote in the Association,” “members . . . enjoy a substantial, although not perfect, identity of interest with the system,” “service is extended only to persons who enjoy these rights,” “the system is run on a non-profit basis,” and “membership in the ‘co-op’ is not a pre-requisite for purchasing land in the subdivision.” *Id.* at \*38–39. Even though all of these factors have been met, the Maine Commission stated, “[t]his case is a close one and

[management] could have served his cause more effectively had he taken the trouble to organize his ‘co-op’ on a formal basis.” *Id.* at \*38 (emphasis added).

56. The Commission finds that ABACO fails to meet most of the factors identified in *In re Kimball Lake Shores Association*. ABACO system is not owned entirely by its users, the terms of the service are not subject to control by vote by members, members do not enjoy any identity of interest with the system, service is not extended only to persons who enjoy these rights, and the system is run on a for-profit basis. *Supra* ¶¶ 49–53. Furthermore, ABACO has failed to show that it does not serve or hold itself out as willing to serve the public: ABACO has no ability to control the turnover residents that occupy units it services, ABACO has no ability to prevent Boyne from transitioning properties from Boyne owned properties to stand alone home owner associations, ABACO has expanded its system since this Complaint was initiated, and the facts presented at hearing indicate ABACO may be asked to expand its system in the future. *Supra* ¶¶ 42–46. After comparing ABACO’s situation to the “close case” analyzed in *Kimball Lake Shores Association*, the Commission finds that ABACO is a public utility.

#### **Availability of Alternative Service Providers**

57. ABACO argues that it is not a monopoly, and should not be considered a public utility, because alternatives are available to its customers. Test. of Stacy Tschider at 6:9–8:2; *see also* ABACO Resp. Br. at 8–9. ABACO Resp. Br. at 8 (citing Hr’g Tr. at 172:21–25; 298:14–18; Ex. 2 to Jonson Testimony; Agreement to Provide Propane Services, § 7(c)(i); Test. of Jeffrey Jonson at 4:4–9). The Commission declines to find this information determinative because nothing in the relevant law requires the Commission to find that a service provider is a natural monopoly for the purposes of establishing an entity as a public utility.<sup>6</sup> Furthermore, this argumentation invites the Commission to examine the attributes of particular end users on the system, which may have varying availability of alternatives. This inquiry would be contrary to both *Lockwood Water Users Ass’n* and Mont. Code Ann. § 69-3-101 that examine the attributes of the service provider and the rights and privileges universally offered to all end users of a

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<sup>6</sup> Even though the Commission declines to make a finding here, it notes that availability of alternatives is not the test of a natural monopoly: “The term does not refer to the actual number of sellers in a market but the relationship between demand and the technology of supply. If the demand within a relevant market can be satisfied at lowest cost by one firm rather than two or more, the market is a natural monopoly, whatever the actual number of firms in it.” Richard A. Posner, *Natural Monopoly & Its Regulation*, 21 Stan. L. Rev. 548, 548 (1968).

system in determining whether an entity is a public utility. Otherwise, the Commission could find that a service provider was a public utility for certain customers based on their individual circumstances and not a public utility for another segment of customers. This also could require the Commission certify individual customers as public utility customers instead of determining a system is a public utility as a whole.

### **Discriminatory Pricing**

58. Shoshone has alleged that ABACO is engaged in a discriminatory pricing scheme. Shoshone Opening Br., 9–10 (Aug. 11, 2016). From 2011 to 2014, the rates provided by ABACO in response to SHOA-001(b) indicate a wide range of rates charged to various customers:

Year	Lowest Rate	Highest Rate
2011	\$1.89	\$3.76
2012	\$2.01	\$4.40
2013	\$1.68	\$3.70
2014	\$1.70	\$3.00

Shoshone Opening Br. at 9 (citing DR SCHOA-001(b)). These rates are provided as an annual dollar amount average per gallon. In its Response Brief, ABACO did not provide any explanation for these differing rates.

59. The Commission has an obligation to investigate or hear complaints of any discriminatory rates or practices by an entity that provides utility service. Mont. Code Ann. §§ 69-3-321(1). Discriminatory rates may be appropriate if customer classes have varying costs of service. *See* Portland General Exchange, Inc., 51 F.E.R.C. ¶ 61,108, 61245, 1990 FERC LEXIS 923, \*28, 112 P.U.R.4th 264 (F.E.R.C. 1990) (“[D]ifferences in rates must be based upon factual differences, for instance, in a utility’s cost of service”). Discretionary rates are not justified when the self-interest of the carrier is the basis of the differential treatment. *United States v. Ill. C. R. Co.*, 263 U.S. 515, 524 (1924) (“Self-interest of the carrier may not override the requirement of equality in rates”). The parties and Commissioners have identified that Boyne may wield more influence over ABACO than other customers. Hr’g Tr. at 131:5–132:18; 179:5–180:10; 189:12–192:3. The Commission does not have the requisite cost of service information

to determine whether these are due or undue discriminatory rates. Once this information becomes available, the Commission will examine whether these varying rates are lawful.

### **Existing Contracts and Agreements to Remain in Place Until the Commission Establishes Rates for ABACO**

60. The Commission finds that ABACO's existing contracts and agreements—in any form—with its various customers may remain in place until the Commission has an opportunity to institute tariffed rates. Under Mont. Code Ann. § 69-3-305, public utilities may not “charge, demand, collect, or receive a greater or less compensation for a utility service performed by it within the state or for any service in connection with a utility service than is specified in the printed schedules, including schedules of joint rates, that may at the time be in force.” Because ABACO is just now declared a regulated public utility, the Commission has not had an opportunity to authorize rates for ABACO. Mont. Code Ann. § 69-3-305(6) provides an exception to tariffed rates when an existing contract is in place: “this [section] does not have the effect of suspending, rescinding, invalidating, or in any way affecting existing contracts.” The Montana Supreme Court interpreted this particular language.

[U]ntil changed by the commission, the rates, tolls and charges were to remain as fixed in existing contracts; that the passage of the Act did not *ipso facto* operate to invalidate or affect existing contracts, even though the contracts granted rebates, concessions and special privileges--which it was one purpose of the Act to eliminate from public utility life in this state. In other words, the sentence read with its context merely provided a device to maintain existing rates until such a time as the commission, after investigation, might see fit to change them. Pending that time the utilities were protected from prosecution even though the existing contracts granted rebates, concessions and special privileges.

*Billings v. Pub. Serv. Comm'n*, 67 Mont. 29, 38–39, 214 P. 608, 609–10 (1923). The imposition of a new regulatory regime through statute is akin to the Commission's decision to take jurisdiction over ABACO. The Commission finds that the same interpretation of exempting contracts in Mont. Code Ann. § 69-3-305(6) applies to ABACO's existing contracts and agreements until the Commission has the opportunity to issue tariffs. However, the Commission finds that ABACO's existing contracts and agreements must remain “fixed” until the Commission has the opportunity to issue tariffs.

61. In order to monitor this requirement, ABACO must file its existing contracts and agreements with the Commission by January 31, 2017. See *Qwest Corp. v. Mont. Dep't of Pub.*

*Serv. Regulation*, 2007 MT 350, ¶¶ 33–39, 340 Mont. 309, 174 P.3d 496 (“the PSC’s enabling statutes authorize the PSC to obtain information from utilities in any manner necessary to perform its duties”). If an agreement to provide propane services is not in the form of a contract for certain customers, ABACO must explain how service has been provided in the past and how it will continue to provide service consistent with these past practices. To the extent variation is permitted in rates charged to customers as described in Paragraphs 58 and 59 of this Order, ABACO must provide an account of its billing practices that permit such variation.

### CONCLUSIONS OF LAW

62. All findings of fact that are properly conclusions of law are incorporated herein and adopted as such.

63. “The commission shall proceed, with or without notice, to make such investigation as it may deem necessary upon a complaint made against any public utility by any mercantile, agricultural, or manufacturing society or club; by any body politic or municipal organization or association, the same being interested; or by any person, firm, or corporation, provided such person, firm, or corporation is directly affected thereby, that: (a) any of the rates, tolls, charges, or schedules or any joint rate or rates are in any way unreasonable or unjustly discriminatory; (b) any regulations, measurements, practices, or acts whatsoever affecting or relating to the production, transmission, delivery, or furnishing of heat, light, water, power, or regulated telecommunications service, or any service in connection therewith is in any respect unreasonable, insufficient, or unjustly discriminatory; or (c) any service is inadequate.” Mont. Code Ann. § 69-3-321.

64. The Commission has full power of supervision, regulation, and control of public utilities in Montana. Mont. Code Ann. § 69-3-102.

65. “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 . . .” Mont. Code Ann. § 69-3-101.

66. A service provider meeting the statutory definition of a public utility may be exempted from this status if it satisfies the group service criteria described in *Lockwood Water Users Ass'n v. Anderson*, 168 Mont. 303, 542 P.2d 1217 (1975).

67. “[W]hen private property is devoted to a public use, it is subject to public regulation.” *Munn v. Illinois*, 94 U.S. 113, 130 (1876).

68. Property becomes “clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.” *Id.* at 126.

69. “[W]hen ‘one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created’ . . . .” *Great Northern Utils. Co.*, 88 Mont. at 205, 293 P. at 298.

70. ABACO is a public utility subject to the jurisdiction of the Commission. Mont. Code Ann. § 69-3-101.

71. All findings of fact in this Order are entered based on a preponderance of the evidence in the record. Generally, the Commission is “bound by common law and statutory rules of evidence.” *Id.* at § 2-4-612(2). The statutory rules of evidence require findings of fact in a civil matter to be based on a preponderance of the evidence. *Id.* at § 26-1-403(2). Thus, the Commission’s role in a contested case proceeding is, in part, to “enter findings of fact based on the preponderance of the evidence presented.” *Mont. Evtl. Info. Ctr. v. Mont. Dept. of Evtl. Quality*, 2005 MT 96, ¶ 22, 326 Mont. 502; *see also Clement v. Mont. Dept. of Labor & Indus.*, 2008 MT 388N, ¶¶ 8, 10, 348 Mont. 370 (applying the preponderance standard in a contested case involving the revocation of a professional license).

72. The Commission has afforded due process to all parties and an opportunity to participate to the public throughout this proceeding. Mont. Code Ann. § 2-4-601. The opportunity for public participation was substantial, significant, and meaningful. *Supra* ¶¶ 1–9.

**ORDER**

73. ABACO's late filed exhibit is inadmissible.

74. Shoshone has standing to bring its Complaint against ABACO.

75. ABACO is a public utility under Mont. Code Ann. § 69-3-101 and does not meet the group service exemption described in *Lockwood Water Users Ass'n v. Anderson*, 168 Mont. 303, 542 P.2d 1217 (1975).

76. Consistent with Paragraphs 60 and 61 of this Order, ABACO must provide the Commission all of its contracts and agreements currently in effect by January 31, 2017, and must file with the Commission information sufficient to meet the minimum rate case filing standards by April 28, 2017.

DONE AND DATED this 13th day of December, 2016, by a vote of 3 to 1.  
Commissioner Bushman dissenting and Commissioner Lake abstaining.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION



BRAD JOHNSON, Chairman



TRAVIS KAVULLA, Vice Chairman



KIRK BUSHMAN, Commissioner (Dissenting)



ROGER KOOPMAN, Commissioner



BOB LAKE, Commissioner (Abstaining)

ATTEST:



Sandy Scherer  
Administrative Assistant

(SEAL)

