

Service Date April 22 1975

BEFORE THE UTILITIES DIVISION
DEPARTMENT OF PUBLIC SERVICE REGULATION
MONTANA PUBLIC SERVICE COMMISSION

* * * * *

IN THE MATTER OF the motion of)	UTILITY DIVISION
THE MONTANA CONSUMER COUNSEL for)	
a Hearing on Montana Power Co.)	DOCKET NO.6221 & 6310
Tariff Filing of GSG-72)	ORDER NO. 4189
Supplement No. 7)	
)	

On April 9, 1975, the Montana Power Company submitted to this Commission GS5-22 Supplemental rate tariff No. 7, which it alleges to be pursuant to the previous, Montana Public Service Commission's Order No. 6147, in Docket No. 6221. This supplemental filing was a rate tariff which would have allowed the pass-through of Montana and Canadian purchased gas and royalty costs to reflect a \$25 million increase in costs over revenue generated prior to Docket No. 6221.

On April 10, 1975, the Montana Consumer Counsel submitted a formal motion to this Commission objecting to any consideration by the Commission of the rate schedule filed in Supplemental Filing No. 7 until a public hearing was held and a full opportunity provided to all parties of interest to participate.

Preliminary briefs were submitted by both sides on April 11, 1975, and on April 14, 1975, a hearing was held on whether to grant Consumer Counsel's motion for a hearing on the tariff.

The Consumer Counsel contends that "the \$25 million request

(of Montana Power Co. in GSG-72, Supplement No. 7) is clearly far in excess of that amount previously sought and noticed in Docket No. 6221" and stated in Order No. 4147, Finding of Fact No. 6 and was therefore beyond the scope of the hearing and order on that docket. The Montana Power Co. contends Order No. 4147 is sufficiently broad to authorize the \$25 million revenue to be raised by GSG-72, Supplement No. 7 and that this Commission is without authority to engage in any interpretation or construction of the record underlying Order No. 4147 even for the purpose of determining whether or not the Commission has jurisdiction.

QUESTION: At the April 14, 1975, hearing, the sole question before the Commission was whether or not the Commission had jurisdiction to hold a hearing on the tariff GSG-72, Supplement No. 7, that Montana Power Co. filed to bring about a pass-through of gas costs to the consumer. If the pass-through and the amounts in question were reflected in and contemplated by the proceeding in Docket No. 6221 and Order No. 4147 of the former Commission, then the new Commission would have no jurisdiction in the matter until it was settled by the Montana Supreme Court. If, however, any portion of the pass-through of the amounts in question was not in evidence or at issue in Docket No. 6221, this Commission would have jurisdiction.

The Commission read the briefs submitted on April 11, 1975, and on April 14, 1975, heard the arguments of both counsel. The briefs of April 11 and arguments of counsel of April 14, 1975, were not as enlightening as had been hoped. Therefore the Commission ordered counsel for both sides to expand upon the initial briefs submitted and file the portions of the record where they maintain their respective positions. The

second briefs were submitted on April 17, 1975. The Commission has read those briefs and has done further research on its own and therefrom determines as follows:

FINDINGS OF FACT

1) Findings of Fact No. 6 of Order No. 4147 states that the price of this gas supply, necessary for Applicant to serve its Montana customers 's protected to increase for the year beginning July 1, 1974, by an annual total of \$11,988,000.

2) It is not clear in Order No. 4147 whether Findings of Facts 7, 8 & 9 and other parts of the order refer back to and are limited by Finding or Fact No. 6.

Specifically:

a) The terms of Order No. 4147 are ambiguous, unclear, uncertain and subject to different interpretation in that the Consumer Counsel interprets the order to be limited to an increase projected to be in the area of \$11,988,000 (as appears in that order's Findings of Fact No. 6) and the Montana Power Co. cites that order's Findings Fact Nos. 7, 8 & 9 for the proposition that the order would contemplate a pass - through of actual costs \$13 million in excess of the projected \$11,988,000.

b) The terms of Order No. 4147 are ambiguous in that Consumer Counsel interprets its Finding of Fact No. 4 to mean that Montana Power Co. is not invoking the Order No. 4068 cost of purchased gas adjustment clause in seeking approval of new rates and yet Montana Power seems to contemplate that it is authorized to use that type of procedure in proposing a rate schedule to raise \$13 million in excess of the amount

projected in Order No. 4147, Finding of Fact No. 6.

3) Since they were not members of the Public Service Commission at the time of the hearing in Docket No. 6221, the present five Montana Public Service Commissioners were not at the time of the April 14, 1975, jurisdictional hearing fully familiar with the scope of the matters considered in the hearings on that docket.

In view of these ambiguities and uncertainties, the Commission looked further into the record "pursuant to authority cited in Conclusions of Law A and B). It found:

4) The words of Montana Power Co.'s letter of application, dated April 5, 1975, in Docket No. 6221 (p. 1, paragraph 2), "The purpose of this letter is to obtain your approval for passing on new increases in the cost of gas effective July 1, 1974, to all our customers receiving this gas service in Montana" mean that roughly the \$11,988,000 increased gas and royalty costs effective July 1 would be all that would be passed on as of July 1. This interpretation becomes clear when one considers the words: "On a dollar for dollar basis the cost of this gas supply from all sources in Canada and Montana to meet the needs of our Montana customers will increase at least \$11,988,000 on an annual basis effective July 1, 1974." (From p. 4, paragraph 3 of that same April 14, 1974 letter)

5) Montana Power Co. was asked twice by Commission counsel and by Commissioner Gilfeather to provide citations to the transcript in Docket No. 6221 to indicate whether the testimony given at that time contemplated a pass-through above the \$11,988,000 ceiling, or, if dollar figures were not

available, to at least provide (in the Company's second April 17, 1975 memorandum requested by the Commission) citations to where the concept of such a large \$25 million pass-through above the numbers generally expressed (\$11,988,000) was discussed. Montana Power Co. refused to provide the citations requested.

6) Since Montana Power Co. refused to provide the citations requested, the Commission had its staff independently review the transcript of the hearing in Docket No. 6221 and it takes administrative notice of the transcript to note that:

a) No reference is shown in the transcript of the hearing in Docket No. 6221 by any Montana Power Co. witness to any automatic pass-through or automatic flow-through in issue or requested in that docket not to any pass-through contemplated to be in excess of \$11,988,000. The word "automatic" is simply not used.

b) No other reference by any Montana Power Co. witness at that hearing seems to contemplate or that of a greater rate increase than the projected \$11,988,000.

c) The transcript of the hearing in Docket No. 6221 clearly indicates that the words in Order No. 4147 "actual cost," "actual royalty cost," and "actual increase or decrease after July 1, 1974" were not inserted in the order for the purpose of indicating that "no dollar limitation in directing a pass-through" was intended as Montana Power Co. claims (p.3, April 17, 1975 memorandum). The use of the word "actual" goes only to the point of whether reporting to the Commission and billing to the customer should be based on actual figures or on estimated figures (see Tr. in PSC Docket No. 6221, pp. 72-97, 145-149) and is intended to satisfy the cross examination

of Mr. J. W. Heidt by Mr. O'Leary.

d] The scope of testimony preserved in the transcript of hearing on Docket No. 6221 indicates the words in Order No. 4147 that "any increase or decrease in costs of gas so computed (quarterly) . . . be applied (equally) to all of the Company's other customers on and after October 1, 1974, pursuant to a rate schedule supplement . . ." means that any increase up to \$11,988,000 shall be charged each year "on and after October 1, 1974" according to a rate schedule supplement. Those words "on and after" do not mean that all expenses incurred "on and after October 1, 1974" should be passed on, but rather they mean only that certain expenses estimated to go to \$11,988,000 should be passed on "on and after October 1, 1974" indefinitely, as long as they existed. It should be noted that no party here has expressly highlighted the words "on and after" in written or oral argument for any interpretation other than that given in this order by the Commission, but the Commission is dealing with the wording here because it considers that wording to be part of the ambiguity which had to be resolved in Order No. 4147.

7) Montana Power Co. did not receive the letter (issued October 1, 1974) telling of the increased cost of Canadian gas to \$1 per mcf which Montana Power Co. is seeking to pass on by GSG-72, Supplement No. 7, until October 10, 1974 three months following the hearing on Docket No. 6221.

8) When the Montana District Court reviewed Order No. 4147, it refused to admit into evidence Exhibit 1, of the Montana Power Co., which contained reference to \$1 per mcf gas to be purchased in Canada. By an express stipulation [appearing on p. 103 of the District Court transcript) Robert E. Corette, attorney for the Company, said that Exhibit 1 had never been

submitted to the Commission for its consideration. The District Court ruled that because the Commission had never considered the exhibit that it was not relevant for consideration under the scope of review which the District Court was held to, which was to review matters that had been under consideration in Docket No. 6221.

9) The test period of estimated cost increases in the scope of Docket No. 6221 as repeatedly referred to by Montana Power Co. witnesses was until June 30, 1975.

10) The Montana Power Co. submitted a proposed order in Docket No. 6221, but the Consumer Counsel did not submit a proposed order.

11) The following underlined words were stricken in Order No. 4147 by the Commission from the proposed wording for the order submitted by Montana Power Co.: (parenthesis indicate words not in Montana Power Co. draft)

IT IS FURTHER ORDERED that any increase so determined to be limited to the delivery volumes set forth in the "Findings of Fact and) Conclusions of Law. Such delivery volumes will be re-determined (every three months thereafter;) chortle and after the initial twelve months will continue to be redetermined quarterly;

12) The 1972 Docket No. 6100, Order No. 4068, rate order purchase gas adjustment clause was never incorporated in the 1974 rate proceeding in Docket No. 6221,

13) Since the 1972 Order No, 4068 regarding Montana Power Co. was issued, the former Commission issued Order No. 4101, in Docket No, 6126, in a Montana-Dakota Utilities rate application eliminating a purchased gas adjustment clause

from the general gas rate schedule.

14) Subsequent to the Montana Power Co.'s 1972 general rate hearing, the Commission has refused to adopt any further automatic adjustment clauses.

15) The Commission has approved of rate schedule Supplements No. 5 (October 1974) and 6 (January 1975) but neither rate supplement was projected to raise more than the \$11,988,000 of revenue, commonly referred to as the maximum amount in question in Docket No. 6221.

16) That Consumer Counsel petitioned for rehearing in Docket No. 6221 on September 12, 1974 and supplemented that petition on September 24, 1974. That petition was denied on September 26, 1974. This Commission is not by this order attempting to abrogate the order of the previous Commission which denied the rehearing on any matter in evidence in Docket No. 6221.

17) Rate making is a "contested case" as defined in 82-4202, RCM 1947, and requires an opportunity for hearing after reasonable notice according to 82-4209, RCM 1947.

18) The approving of amounts of money to be charged to utility customers above the \$11,988,000 authorized in Order No. 4147, is rate making.

19) The Montana Supreme Court presently has jurisdiction over any matter actually in issue in PSC Docket No. 6221, or clearly covered in Order No. 4147.

20) The general issues of automatic adjustment clauses, the constitutionality of fuel cost pass-through and their legality under the Administrative Procedures Act and the

propriety of holding hearings in those matters which are limited to exclude consideration of a utility's entire financial status was within the scope of the review of PSC Docket No. 6221 proceeding before the Supreme Court and will not be considered by this Commission until that Court rules. Any argument, either oral or written, made either by Consumer Counsel or Montana Power Co. on those issues has not been taken into account in making this order

CONCLUSIONS OF LAW

Conclusions Following From Findings of Fact Nos. 1-3:

A) When the terms of an order are ambiguous, it is proper to go behind the order to look at the pleadings, judgment roll or entire record to resolve the ambiguity. *Quigly et al. v. Macintosh et al.*, 110 Mont. 495, 510, 511 (1940).

B) An Administrative Commission not familiar with a record made by its predecessor may review that record even if the matter is also being reviewed in the courts, if the sole purpose of review by the administrative body is to determine the scope of the proceeding before the predecessor commission and the courts so that the proper jurisdiction of a similar matter continuing on from the actions being considered by the court may be established.

Conclusions Following From Findings of Fact Nos. 1-9:

C) Once the burden of proof had been sustained by the moving party, Consumer Counsel, and the burden of going forward with the evidence had shifted to the Montana Power Co. the Company refused to go forward with the evidence and thus did not carry its burden.

Conclusions Following From Findings of Fact Nos. 7 & 8:

D) The Montana Power Co. by attempting to admit Exhibit 1 into evidence in the District Court interprets Order No. 4147 as not covering pass-through in excess of the \$11,988,000.

E) Montana Power Co. could not have included the \$1 per mcf Canadian gas costs within the scope of a July, 1974, hearing if it did not know of the existence of those costs until October, 1974.

Conclusion Following From Findings of Fact Nos. 11-14:

F) That the former Commission intended in recent times to eliminate, or to refuse to adopt, automatic adjustment clauses or any reference to extend Carte Blanche rate adjustments.

Conclusions Following From Findings of Fact Nos. 1-14:

G) The scope of Docket No. 6221 and Order No, 4147 only included an equal passthrough to \$11,988,000, for all classes of natural gas customers.

H) "In the interest of certainty, administrative orders should be limited strictly to the disposition of only such issues as are actually presented and the order may not extend beyond the scope of the hearing. The order must conform to the application, . . . and it must be limited to the matters mentioned in the notice of hearing." 73 C.J.S., Public Administrative Bodies and Practice, Sec, 142.

Conclusions Following From Finding of Fact No. 15:

I) Mere approval of rate tariffs to raise less than \$11,988,000 or to decrease revenue raised is not an admission that future tariffs filed to raise more than \$11,988,000 projected by Finding of Fact No. 6 of Order No. 4147 must be automatically approved.

J) The Montana Public Service Commission can approve or deny rate tariffs pursuant to Order No. 4147 to raise only \$11,988,000 since the record indicates the order must be read as a whole and Finding of Fact No, 6 limits the authority granted by the order.

K) The Montana Public Service Commission could only deny such tariffs if it found the following: 1) that the tariffs would in fact raise more than the \$11,988,000 within the scope of Docket No. 6221; 2) that the rate schedules filed pursuant to Order No, 4147 did not reflect an equal pass-on of costs to the utility's customers under that rate schedule.

Conclusion Following From Findings of Fact No. 16:

L) Since the only hearing granted by this order is not to be a hearing on old matters, but in fact a hearing on new matters (Exhibit 1) which, as stipulated by company counsel have not been previously before this Commission, the Montana Power Co.'s reference by analogy tp.3, April 17, 1975 memorandum) to Judge Peter G. Meloy's decision in Civil Cause No 38811 regarding rehearings, is irrelevant.

Conclusions Following From Findings of Fact Nos. 8 & 17-20:

M) The Consumer Counsel motion for a hearing on the rates which would raise revenue above the additional \$11,988,000 projected in Order No. 4147, Findings of Fact No. 6, is

required by law and this Commission has jurisdiction. Any rates which would raise additional revenue to the \$11,988,000 level discussed in Docket No. 6221 is not in this Commission's jurisdiction at this time (other than as set forth in Conclusions 1, J & K) but is in the jurisdiction of Montana's Supreme Court.

N) The statement by the Montana Power Co. counsel (in its April 17, 1975 memorandum) that "the Supreme Court of the State of Montana cannot" . . . be deprived of its jurisdiction, when once acquired by any act or order whatsoever of the inferior tribunal . . . "although good law, is relevant only to that portion of the revenue (11,988,000) which is covered by Order 4147 (Findings of Fact No. 6) and which is contemplated under the issues contained in Docket No. 6221. This Commission is not by this order attempting to deprive the Supreme Court of any jurisdiction it is merely only considering revenue not authorized by such order.

O) Consumer Counsel's objection and motion is addressed to the proper forum since material not previously at issue in any administrative or judicial proceeding, namely the pass-through of gas costs above the \$11,988,000 revenue increase figure, is at issue here and the Consumer Counsel must exhaust his administrative remedies before proceeding to any judicial forum.

P) Even if Judge Meloy was in error in not having admitted Exhibit I into evidence in the District Court, or in not remanding that particular portion of the case to the Commission for a hearing on Exhibit I, an Appellate Court, the Montana Supreme Court, is not the proper body to decide upon that new evidence. In fact, a proper body would be this administrative Commission which in the past for example, was

directed to look at new evidence when the Tobacco River Power Co. v. PSC, 109 Mont. 521, 536, 98 P2d 886 11940) case was remanded to the Commission.

O R D E R

At a session of the Montana Public Service Commission, held in its offices at 1227 11th Avenue, Helena, Montana, on April 21, 1975, there being present Commission Chairman Gordon E. Bollinger and Commissioners P. J. Gllfeather, Thomas G, Monahan, James R. Shea and George Turman, at 10:00 AM there regularly came before the Commission for final action the matters in the Montana Consumer Counsel's motion for hearing on the Montana Power Company s April 9, 1975, filing of GSC-72 rate Supplement No. 7 allegedly proposed to Order No. 4147, Docket No. 6221 The Commission being fully advised in the premises orders the following:

- 1) The part of the motion of Consumer Counsel for a hearing on the portion of gas purchased and royalty costs requested to be passed on to the consumers by Montana Power Co. above \$11,988,000 is granted and hearing thereon is hereby set to convene on May 16, 1975, at 10:00 AM (MDT), at the Commission offices, 1227 11th Avenue, Helena, Montana 59501, and that the matter be assigned Docket No. 6310 and that such hearing may be recessed from time to time as may be found necessary and proper by the Commission. In accordance with the terms of the stipulation entered into by all of the parties in Docket No. 6221, on October 11, 1974, and in accordance with the Montana Supreme Court's January 8, 1975, order granting stay of Judge Meloy's order in the District Court as to the question of the propriety of a limited hearing, this hearing will be limited to the cost of purchased gas and royalties exceeding the \$11,988,000 figure.

If the Supreme Court should rule in the future against Judge

Meloy on the issue of whether or not the Constitution or Administrative Procedures Act require a full hearing on any rate increase, it is contemplated that the hearing to be held in the near future on Montana Power's pending general rate application in Docket No. 6279, would be used to satisfy any full hearing requirements and that the rate increase or decrease resulting from that hearing would be made retroactive to the date of the order which will result from the May 16, 1975 hearing.

2) Montana Power's schedule GSG-72 Supplement No. 7, as Submitted to the Commission on April 9, 1975, is denied because it exceeds the authorization of Order No. 4147 and the scope of Docket No. 6221.

3) Montana Power Co. is ordered to file with this Commission a supplement to Schedule GSG-72, which reflects and would raise only the additional \$11,988,000 in revenue, which is the ceiling of the rate increase authorized by Order No. 4147, Findings of Fact No. 5, issued by the former Commission and being reviewed by the Montana Supreme Court.

4) Utilities that are bothered by cash flow problems caused by delays in this docket should immediately bill their customers based on the schedule which this Commission has ordered to be filed in the above paragraph (3). The Commission is aware of cash flow and billing problems spawned by uncertainties caused by procedures established to mirror the gas pass-through in Docket No. 6221, but will not propose procedures to remedy those problems until the Supreme Court has ruled whether or not the pass-through procedure itself will in fact continue.

The foregoing was adopted by the Montana Public Service

Commission by a unanimous vote.

DONE IN OPEN SESSION at Helena, Montana on April 21, 1975.

GORDON E. BOLLINGER, Chairmen

P.J. GILFEATHER, Commissioner

THOMAS G. MONAHAN, Commissioner

JAMES R. SHEA, Commissioner

GEORGE TURMAN, Commissioner

ATTEST:

GAIL E. BEHAN
Secretary

(seal)