

Service Date: August 5, 1980

DEPARTMENT OF PUBLIC SERVICE REGULATION
MONTANA PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

DAVID F. STUFFT and MAYLA S. STUFFT,)
husband and wife; DARRELL T. PETERSON)
and KAY S. PETERSON, husband and wife;)
and, GARY WOLLAN and SHARON WOLLAN,)
husband and wife,)
Complainants,)
—vs—)
MOUNTAIN STATES TELEPHONE &)
TELEGRAPH COMPANY,)
Defendant ,)
And)
NORTHERN TELEPHONE CO-)
OPERATIVE, INC.,)
Intervenor.)

UTILITY DIVISION
DOCKET NO. 6784
ORDER NO. 4673

APPEARANCES

FOR THE COMPLAINANTS:

David F. Stufft, 13 East Main, Wilkins Building, P.O. Box 997, Cut Bank,
Montana, 59427

Darrell T. Peterson, 101 1st Avenue S. E., Cut Bank, Montana 59427

FOR THE DEFENDANT :

John Alke, 406 Fuller Avenue, P. O. Box 1166, Helena, Montana 59601

FOR THE INTERVENOR:

Bruce W. Moerer, Drawer D, 153 Main Street, Shelby, Montana 59474

FOR THE COMMISSION:

Eileen E. Shore, Staff Attorney, 1227 11th Avenue, Helena, Montana 59601

BEFORE:

GORDON BOLLINGER, Chairman
THOMAS J. SCHNEIDER, Commissioner
GEORGE TURMAN, Commissioner

SUMMARY OF PROCEEDINGS AND TESTIMONY

1. This proceeding was commenced by a complaint filed on December 21, 1979, by David F. Stufft and Mayla S. Stufft, husband and wife (the Stuffts); Darrell T. Peterson and Kay S. Peterson, husband and wife (the Petersons); and Gary Wollan and Sharon Wollan, husband and wife (the Wollans), Complainants, against Mountain States Telephone and Telegraph Company (Mountain Bell), Defendant. The Complainants, pursuant to Section 69-3-321, MCA, requested that the Public Service Commission (the Commission) order Mountain Bell to provide telephone service to their residences. Northern Telephone Cooperative, Inc. (Northern Telephone), a nonprofit corporation, intervened in this matter. Due notice was given to all parties and on May 7, 1980 at 10:00 a.m., a public hearing was held in the City Courtroom, City of Cut Bank, Glacier County, Montana, at which hearing evidence was presented by the Complainants, Defendant, and Intervenor.
2. The Stuffts and Petersons are two families who have constructed new houses outside the city limits of Cut Bank and outside the present exchange boundaries of Mountain Bell. Neither family currently receives telephone service from any company or cooperative.
3. The Wollans also live outside the city limits of Cut Bank and currently receive telephone service from Northern Telephone.
4. Mountain Bell is a public utility subject to the regulatory jurisdiction of the Montana Public Service Commission. In the present case, Mountain Bell has taken a position of "absolute neutrality" on the merits. They have, by their counsel, stated that they will not serve the Complainants unless ordered to do so by the Commission because they do not wish to "wantonly engage in a territorial integrity fight with Northern Telephone

Cooperative or any other communications utility. " (Reply Brief 1) Service to Complainants by Mountain Bell would require alteration of the current Cut Bank Exchange boundary, and construction of new facilities.

5. Northern Telephone is a cooperative organized under the provisions of Title 35, MCA. Northern Telephone desires to serve the Complainants.

6. Complainants' testimony established the following as reasons why they desire telephone service from Mountain Bell rather than Northern Telephone:

- In their opinion, Mountain Bell gives better phone service than Northern Telephone.
- The Complainants' domestic and professional lives center in Cut Bank, which is served by Mountain Bell.
- If they are served by Northern Telephone all calls from their residences to Cut Bank and from Cut Bank to their residences will result in toll charges.
- Testimony and exhibits indicate that Mountain Bell employees who were not authorized to make such representations indicated to Complainants that they could receive Mountain Bell service.

7. Complainants have not requested telephone service from Northern Telephone .

8. Testimony at the hearing established that in some cases Mountain Bell and cooperatives "trade" territory, i. e., Mountain Bell agrees with a coop to allow it to serve a customer who is within Mountain Bell's exchange boundary or a coop agrees to Mountain Bell's serving a customer in territory the coop usually serves. The Commission takes notice by virtue of its knowledge derived from approving such agreements in the course of carrying out its regulatory duties, that such agreements are made.

9. Northern Telephone is not willing to "give up" its opportunity to serve the Complainants through mutual agreement with Mountain Bell. According to testimony by Lloyd Lavds, Manager of Northern Telephone, this unwillingness results from the following:

- Northern Telephone must serve the maximum number of persons available in order to adequately serve those who have access only to Northern Telephone's service.
- Northern Telephone has recently launched a major program to improve service. This program is being financed by a large loan, and some of the capital investment which would be used to serve Complainants is security for the loan.
- The value of the investment, including recent improvements in plant available to serve Complainants, would be made worthless or would be seriously lessened if Northern Telephone did not serve Complainants .
- If Northern Telephone gave up the opportunity to serve Complainants, other Northern Telephone customers would request similar treatment, thereby further lessening the coop's ability to serve customers in outlying rural areas.
- Northern Telephone's service is currently adequate and will improve by September, 1980, when the current work on improvements is completed.

10. Current customers of Northern Telephone, sponsored by Complainants testified that service is sometimes inadequate.

11. Mr. Lou Marquardt, Staff Manager for Rates and Tariffs for Mountain Bell, testified that Mountain Bell would be unwilling to reimburse Northern Telephone for the value of any equipment the coop has available to serve Complainants, since Mountain Bell could not use any such equipment in serving Complainants.

12. Mr. Marquardt further testified as to complaints by Mountain Bell's current customers regarding service, and explained that it was Mountain Bell's response that its revenues were inadequate to fund substantial improvements.

13. Mr. Marquardt further testified that if the Commission were to order service to Complainants, current Mountain Bell customers would contribute approximately \$750 to equipment additions needed for such service.

ANALYSIS

As the excellent briefs filed in this docket suggest, the issue presented by this Complaint involve serious matters of law and sound regulatory policy. The legal issues are, however, dispositive of the case. Those issues can be summarized as follows:

1. Under the facts presented, do Complainants have a right to a Commission order requiring Mountain Bell to serve them?
2. Under the facts presented, does the Commission have jurisdiction to adjudicate the respective rights of Mountain Bell and a cooperative, as to who should serve present customers of a cooperative and/or potential customers of a cooperative?

Complainants have urged that they have a right to Mountain Bell's service and cite a number of Supreme Court cases involving disputes between regulated electric and gas public utilities and cooperatives over which has the right to serve particular persons or geographical areas. These cases involve the interpretation of relevant statutes governing both cooperatives and regulated public utilities.

Although these cases are informative, they do not go to the issue of whether the Montana Public Service Commission may determine the respective rights of customers, regulated utilities and cooperatives, in the context of the situation presented by Complainants in this case.

The Commission believes that its role in the dispute presented here is circumscribed by Montana statutes and axiomatic utility law.

Section 69-3-102, MCA, sets out the general authority of the Commission to regulate public utilities such as Mountain Bell:

Supervision and regulation of public utilities. The commission is hereby invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation, and control of such utilities by any municipality, town, or village.

Under the provisions of such broad authority, public service commissions and courts have established certain limits, which this Commission has generally adopted.

Case law, both at the administrative and judicial levels have established that, by reason of a public utility's status as a regulated monopoly, it has an obligation to serve. That obligation, as enforced by public service commissions has been circumscribed, however, by certain limitations. Generally, those limitations have been defined by such concepts as "service areas" and "the geographical territory" in which the utility has "held itself out" to serve. For example, these principles would require the Montana Power Company to serve a resident of Missoula, where that company has long served residents generally with natural gas and electric service. The Montana Public Service Commission could legally order Montana Power to serve the Missoula resident. These principles would not require the Montana Power Company to serve Glendive, a community where no resident now receives natural gas or electric service from that Company, a community where the Company has never "held itself out to serve. " (The Montana-Dakota Utilities Co. (MDU) has always provided gas and electric service exclusively to Glendive and to all of that geographic part of the state.)

The question of service area is a factual one: Has the utility, either implicitly or explicitly, held itself out to serve a potential customer?

The factual situation presented by this case is not as simple as the example cited above. Both Mountain Bell and Northern Telephone are serving customers in the general geographic area of Complainants' residences. This situation is not unique to Cut Bank as regards telephone service. Unlike energy companies, where the Montana Power Company has served roughly two-thirds of Montana (extending from the western border) and MDU has served roughly one-third of Montana (extending from the eastern border), Mountain Bell has long provided telephone service throughout the state. Interspersed with Mountain Bell service, however, is service provided by telephone cooperatives which generally serve outlying rural portions of Montana.

Telephone exchange boundaries have roughly served as the geographical limits of where a regulated telephone public utility is obliged to provide service: If a resident desiring service is within an exchange boundary, a regulated utility such as Mountain Bell must usually provide service. There is a presumption that such a resident is entitled to Mountain Bell service.

If, however, the resident desiring service is not residing within an exchange boundary, the utility's obligation to serve, as regulated by the Montana Public Service Commission is less clear, and becomes a factual determination for the Commission. In such a situation the Commission must consider many factors, including (but not limited to):

- service provided to residents in the immediate geographical area;
- alternative service provided by other companies which is available to the potential customer;
- whether the resident requesting service reasonably expected to receive service from the regulated utility. In this regard, the Commission acknowledges that certain Mountain Bell employees told the Stuffts and the Petersons that they could receive Mountain Bell service. Such employees, however, were not authorized by Mountain Bell to make such representations and cannot bind either Mountain Bell or the Commission.

The Commission concludes that Complainants have a right to consideration of its request for Mountain Bell's service, in accordance with the principles discussed above. The Complainants do not, however, have any legal right to an order requiring Mountain Bell to serve them. The Supreme Court cases cited by Complainants are not relevant to the situation presented here. Those cases merely state that, under various factual situations a private utility has superior rights to a cooperative. For whatever reason, Mountain Bell has declined to assert the rights it might have under Montana Supreme Court decisions.

Turning now to the second issue presented by this case, the Commission does not believe it has jurisdiction to decide that Mountain Bell must serve present and potential customers of a telephone coop.

Section 35-18-104, MCA states:

Cooperatives and foreign corporations transacting business in this state pursuant to this chapter shall be exempt in all respects from the jurisdiction and control of the public service commission of this state.

If the Commission were to rule in favor of Complainants in this case, the result would be a reduction in the territory available for Northern Telephone. Thus, by ordering service from Mountain Bell for Complainants, the Commission would be indirectly

determining the coop's service territory. Such action would be contrary to the statute cited above.

The Commission notes in passing that sound regulatory policy supports the legal theories outlined above. A Commission order requiring Mountain Bell service for Complainants could result in an unnecessary duplication of telephone lines; an underlying theory of government-sanctioned utility monopolies is the avoidance of such duplication.

Were the Commission to order Mountain Bell into territory now available to Northern Telephone the coop could suffer a loss of revenue from Complainants and other coop customers requesting similar treatment, to the detriment of coop members who are completely dependent on Northern Telephone for phone service.

The Montana Supreme Court cases cited by Complainants in their briefs suggest the intense competition between regulated private utilities and coops in this state which was once the norm. Should the Commission grant the Complainants' request in this case, a similar unhealthy situation would result, with coop customers coming to the Commission for orders requiring regulated utility service. Mountain Bell, by agreements with federal regulatory agencies, has eschewed any action which would lead to unfair competition with other telephone companies. It is not the role of this Commission to encourage the company to compromise these agreements to the detriment of other companies and the customers of those companies.

Finally, it must be noted that a Commission order requiring Mountain Bell service for Complainants would cost Mountain Bell's current customers approximately \$750. Although the amount is insubstantial in the context of Mountain Bell's total Montana revenues, it represents an important policy problem in view of the Commission's larger regulatory responsibilities imposed by Montana statute. As evidenced by the testimony of Lou Marquardt, both Mountain Bell and the Commission have received numerous complaints from customers, especially in rural areas, that present Mountain Bell service is inadequate. In response, Mountain Bell has claimed that the rates allowed by the Commission are inadequate to meet the financial requirements of service improvements. Based on these inadequacies and Mountain Bell's response to them, it would be illogical

and unwise for the Commission to order the Company to serve new territory through use of current ratepayer contributions. Until Mountain Bell adequately serves its present customers, it should not extend service to those who can secure telephone service from another company.

Being fully advised in the premises, the Commission makes the following findings, conclusions and order:

FINDINGS OF FACT

1. The Petersons and the Stuffts presently do not have telephone service.
2. The Wollens presently have telephone service from Northern Telephone.
3. Complainants wish to have telephone service provided by Mountain Bell.
4. Mountain Bell will serve complainants if ordered to do so by the Commission; otherwise Mountain Bell will not provide Complainants with telephone service.
5. Complainants' residences are not within any current Mountain Bell exchange boundary.
6. Before Mountain Bell could serve Complainants it would have to file a new tariff with the Commission.
7. Northern Telephone is willing to provide telephone service to the Stuffts and the Petersons and is willing to continue to provide telephone service to the Wollens.
8. After weighing the evidence presented, the Commission concludes that none of the Complainants are within Mountain Bell's current service area.

Mountain Bell has not held itself out to serve Complainants as a result of its employees' unauthorized representations that it would provide service.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over Mountain Bell's rates and conditions of service.
2. The Commission does not have jurisdiction over any aspect of Northern Telephone's service, including adequacy of service or territory to be served.
3. The Commission does not have jurisdiction to adjudicate the legal rights of Mountain Bell vis-a-vis Northern Telephone.
4. Complainants do not have a legal right to a Commission order requiring Mountain Bell to serve them with telephone service.
5. Mountain Bell is not legally required to serve Complainants with telephone service.

ORDER

THE MONTANA PUBLIC SERVICE COMMISSION ORDERS THAT:

1. The Complaint that is the subject of this docket is hereby dismissed.
2. All motions and objections not previously ruled upon are hereby denied.

Done and dated this 28th day of July, 1980 by a vote of 2-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GORDON E. BOLLINGER, Chairman

GEORGE TURMAN, Commissioner

THOMAS J. SCHNEIDER, Commissioner
(Voting to Dissent)

Commissioner Schneider will file his dissenting opinion at a later date.

A TTEST:
Madeline L. Cottrill
Secretary
(SEAL)

NOTE: You may be entitled to judicial review of the final decision in this matter. If no Motion for Reconsideration is filed, judicial review may be obtained by filing a petition for review within thirty (30) days from the service of this order. If a Motion for Reconsideration is filed, a Commission order is final for purpose of appeal upon the entry of a ruling on that motion, or upon the passage of ten (10) days following the filing of that motion. cf. the Montana Administrative Procedure Act, esp. Sec. 2-4-702, MCA; and Commission Rules of Practice and Procedure, esp . 38-2.2(64)-P2750, ARM.