

Service Date: December 24, 1984

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

* * * *

IN THE MATTER of the Joint Petition)	UTILITY DIVISION
of the Montana Citizens Utility Board)	DOCKET NO. 84.10.69
(Montana CUB) for Declaratory)	ORDER NO. 5107
Ruling and Rulemaking.)	

DECLARATORY RULING AND
ORDER DENYING PETITION FOR RULEMAKING

* * * *

1. On October 26, 1984, the Commission received a joint petition from the Montana Citizens Utility Board (Montana CUB) therein seeking rulemaking and a declaratory ruling. Montana CUB has requested that the Commission adopt rules "recognizing Montana CUB as the spokesperson for residential utility consumers on electric, gas, and telephone issues." In order to facilitate such group's participation in Commission proceedings, Montana CUB has requested that such rules "require each utility to allow Montana CUB mailings to be inserted within each utility's billing envelope in order to allow the organization to communicate and solicit memberships from ratepayers." The Montana CUB has further suggested that the Commission "adopt certain specific organization criteria in order to provide needed institutional guide lines to Montana CUB."

2. The joint petition correctly recognized that prior to adopting rules with the provisions described above, the Commission would have to find that it had the authority to do so.

Montana CUB requested that the Commission issue a declaratory ruling affirmatively stating that such authority exists.

3. On November 14, 1984, the Commission issued a Notice of Opportunity for Comment soliciting comments on the extent of the Commission's authority in this area. Comments were received from more than 25 public interest groups, utilities, and interested individuals.

4. Based upon a review of the comments and analysis of the applicable law, the Commission concludes that it does not currently possess the requisite statutory authority to adopt the rulemaking scheme contemplated in the petition. In so finding the Commission in no way passes judgment upon the need for additional organized representation of residential consumers or upon the merits of the Citizen's Utility Board concept. Rather, the Commission merely concludes that such a concept can only be implemented by the legislature or in the alternative, by the Commission after specific authority to do so is conferred by the legislature.

5. It is well recognized that the Commission has only those powers conferred upon it by the legislature.

It is a basic rule of law that the Commission, as an administrative agency, has only those powers specifically conferred upon it by the legislature and in determining those statutory powers this Court must give effect to every word, phrase, clause or sentence therein, if it is possible to do so.

City of Polson v. Public Service Commission, 155 Mont. 464, 469, 473 P.2d 508 (1970).

6. The Petitioners and their supporters have relied upon the general language in Sections 69-3-102 and 69-3-103, MCA, as conferring the necessary authority to the Commission to implement CUB rules.

The commission is hereby invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of this chapter...

Section 69-3-102.

...said commission shall have power to prescribe rules of procedure and to do all things necessary and convenient in the exercise of the powers conferred by this chapter upon the commission;

Section 69-3-103.

7. The utilities on the other hand contend that the above language does not confer sufficient authority to implement Petitioner's proposal. They point out that the general language in each statute is limited by references to the remainder of Title 69, Chapter 3.

69-3-102; "subject to the provisions of this chapter" and

69-3-103; "in the exercise of the powers conferred by this chapter upon the commission. ..."

8. Consequently the general provisions of Sections 69-3-102 and 69-3-103 would appear to be compelling only if the acts of recognizing Montana CUB as the exclusive representative of residential ratepayers and of providing access to utility billing envelopes can be said to be done in furtherance of or pursuant to some requirement or authority stated elsewhere in Title 69, Chapter 3. It is not clear to the Commission exactly which provisions of the chapter these acts would be in response to. Petitioner and supporters argued that implementation of the CUB proposal is authorized by the requirement in Section 69-3-201, MCA, that utilities provide reasonably adequate service at just and reasonable rates. The connection between the CUB proposal and the requirements of 69-3-201 would seem tenuous at best. That connection can hardly be said to meet the case law standards for determining Commission authority, City of Polson, quoted earlier, and

The Commission is a mere administrative agency created to carry into effect the legislative will. It has only limited powers, to be ascertained by reference to the statute

creating it, and any reasonable doubt as to the grant of a particular power will be resolved against the existence of the power. .

State ex rel. Thatcher v. Boyle. 62 Mont. 97, 102, 204 P. 378 (1921), quoted with approval in Montana Power Company v. Public Service Commission ____Mont.____, 671 P.2d 604, 611 (1983).

9. The connection between the CUB proposal and 69-3-201 is dubious and therefore does not establish the requisite Commission authority pursuant to Boyle. Nor is it sufficient to argue that authority exists because the CUB proposal would promote public participation and assist the Commission in its deliberations. This same argument was advanced by the Commission in Montana Dakota Utilities Co. v. Montana Public Service Commission, Lewis and Clark County District Court Cause No. 47413, wherein the Commission had adopted rules providing for the awarding of attorney's fees and costs to interveners in rate cases. The court specifically held (page 6, Opinion and Order of Judge Peter Meloy, issued December 20, 1982) that the Commission did not have the power to adopt such rules as they did not "concern public utility regulation 'as contemplated by statutes'." This finding was entered before the Court went on to consider whether such rules constituted a judicial act.

10. Petitioners and supporters drew attention to the fact that the Commission has previously adopted rules requiring utilities to provide information to consumers. Section 38.5.1502 A.R.M. requires that utilities send a statement to consumers outlining proposed rate changes. Section 38.5.1503 A.R.M. requires that utilities provide information to consumers concerning alternative rate schedules. Petitioners maintain that the same authority that allowed the Commission to adopt those rules would allow the Commission to adopt rules implementing the CUB proposal. It would appear; however, that there is a distinction. Although authority to adopt 38.5.1502 and 38.5.1503 has never been challenged, if it were, a strong argument could be made that 38.5.1502 responds to the requirement in 69-3-303, MCA that notice be given of

proposed rate changes, and that 38.5.1503 responds to the requirement in 69-3-301, MCA that rate schedules be open to public inspection and readily accessible.

11. It is generally recognized that regulation of public utilities and ratemaking is a legislative function. In recognition of time constraints and the need for the exercise of some expertise, the legislature has delegated to the Commission, authority to perform many of the activities involved in such regulation. The question arises in this matter as to whether the legislature delegated to the Commission the power to designate the official representative of residential ratepayers or on the other hand has retained that power itself. As has already been discussed, an analysis of the statutes would indicate no such delegation. Other factors seem to support the same conclusion.

12. Designation of “official” representatives of ratepayers would not seem to require any degree of expertise unique to the Commission. The legislature itself established the Montana Consumer Counsel pursuant to constitutional directive to represent the consuming public in matters before the Commission. In its 1977 session, the legislature considered a proposal in H. B. 729 to establish a Montana Residential Utility Consumer Action Group as a nonprofit corporation to represent interests of residential utility consumers before the Commission. That group would have functioned almost identically as set forth in the CUB proposal.

13. Clearly the legislature has been involved in efforts to establish official representatives of consumers in the past and should probably continue to be involved in the future. It would be a very questionable undertaking for this Commission to adopt the CUB proposal at this time, thereby implementing the very concept that the legislature had earlier rejected. If the CUB proposal is an idea whose time has come, that is for the legislature to determine.

14. Even if the Commission could find that it has the authority to recognize “an” official representative of the residential ratepayers and to allow “general” access to utility billing envelopes, which it has not found, it would be hard pressed to find that the authority extended to recognizing “the exclusive” official representative of residential ratepayers and providing for “exclusive” access to utility billing envelopes. By way of dicta, the Commission has grave concerns about the exclusivity nature of the CUB proposal.

15. The utilities in their comments raised numerous constitutional questions concerning third party access to utility billing envelopes. Because the Commission has determined that it does not have authority to require such access, it is not necessary to address those questions at this time.

16. Again it must be emphasized that in issuing this order the Commission has not passed upon the merits of the CUB proposal. The Commission reserves the right to evaluate and possibly support any similar proposal submitted to the legislature.

17. The Commission declares that it does not now possess the requisite authority to adopt the rulemaking scheme proposed by Petitioner in its filing of October 26, 1984.

For this reason the Petition for Rulemaking is DENIED.

DONE IN OPEN SESSION this 21st day of December, 1984, by a vote of 4 to 1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

THOMAS J. SCHNEIDER, Chairman

HOWARD L. ELLIS, Commissioner

CLYDE JARVIS, Commissioner

DANNY OBERG, Commissioner

JOHN B. DRISCOLL, Commissioner
(Voting to Dissent)

ATTEST:

Madeline L. Cottrill Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.