

Service Date: May 21, 1991

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

SILVERBOW OWNERS ASSOCIATION, a)	
Non-profit Condominium Association)	
of the State of Montana,)	UTILITY DIVISION
)	
Complainant,)	
)	DOCKET NO. 89.3.5
vs.)	
)	
LONE MOUNTAIN SPRINGS, INC.,)	ORDER NO. 5493b
)	
Defendant.)	

FINAL ORDER

APPEARANCES

FOR THE COMPLAINANT:

James J. Screnar, Esq., Screnar, Guenther & Zimmer, P.O. Box 1330, Bozeman, Montana 59771-1330

FOR THE DEFENDANT:

Thomas R. Anacker, Esq., Kirwan & Barrett, P.O. Box 1348, Bozeman, Montana 59771-1348

FOR THE COMMISSION:

Timothy N. Sweeney, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620-2601

BEFORE:

JOHN B. DRISCOLL, Commissioner & Hearing Examiner

BACKGROUND

1. On March 24, 1989 Silverbow Owners Association (Complainant or SOA), a nonprofit condominium association, filed the instant complaint against Lone Mountain Springs, Inc. (Defendant or LMS), a privately-owned water utility. The complaint alleged that LMS was financially responsible for repairs to certain water service pipelines located within the boundaries of the Silverbow I and Silverbow II condominium complexes; that LMS is currently providing inadequate water service and facilities to the residents of Silverbow I and II due to leaks still existing in these same pipelines; and that LMS is responsible for making all necessary repairs to these pipelines.

2. On April 26, 1989 Defendant filed its answer and counterclaim. Defendant admitted therein that leaks existed in the water service pipelines located within the boundaries of Complainant's real property. Also, Defendant affirmatively alleged that it had made repairs to said pipelines.

3. In its Combined Exceptions to the Proposed Order and Brief, Defendant argues that its affirmative allegation as to these repairs was made in conjunction with the further allegation that Complainant and Defendant had acknowledged that the responsibility for paying for the costs of repairs was in dispute and that responsibility would be determined at a later date.

4. In its Answer and Counterclaim, page 2, lines 12-18 (Answer), Defendant admitted to making repairs to the water service pipelines. On page 6, lines 15-20 (Counterclaim), Defendant alleges that responsibility was in dispute and would be determined at a later date. Whether this admission and allegation were made in conjunction with each other is irrelevant since the party's agreement to resolve financial responsibility at a later date is a non issue here.

5. On August 29, 1990 this Commission denied Defendant's motion to dismiss for failure to state a cause of action. The Commission determined that though the parties were essentially requesting a declaratory ruling on the application of Section 69-4-511, MCA, to condominium complexes, sufficient facts had been pled to maintain a complaint based on inadequate service and/or facilities. See Order Denying Defendant's Motion To Dismiss For Failure To State A Cause Of Action, p. 3 (Order No. 5493).

6. On October 11, 1990 this matter came before the Commission for a properly noticed hearing. At the close of the hearing, and pursuant to a motion made by Defendant, Commissioner Driscoll directed both parties to put before the Commission briefs containing proposed findings of fact and conclusions of law. Said briefs were to be submitted no later than November 30, 1990.

7. On November 30, 1990 the parties filed a stipulated motion for an extension of time for the filing of post-hearing briefs. The Commission thereafter granted an extension of time to January 10, 1991.

8. On January 10, 1991 the Commission received the Complainant's brief containing proposed findings of fact and conclusions of law. No brief was submitted by Defendant.

9. On March 6, 1991 the Commission issued Proposed Order No. 5493a. On March 25 and March 27, respectfully, Complainant and Defendant filed exceptions to the Proposed Order. On April 8, 1991 the Commission heard oral argument on the Exceptions.

SUMMARY OF TESTIMONY

For the Complainant

10. Ira Sumner, a resident of the Silverbow complex and a member of SOA's board of directors, testified that in late 1987 the board was notified by the Defendant that bad water leaks existed within the complex. He further testified as to subsequent meetings with Lone Mountain Springs officials during which it was agreed that Defendant would make the necessary repairs with the issue of financial responsibility to be decided later. Testimony was also provided concerning water shortages and rationing at the Silverbow complexes and instances where the water was turned off. Mr. Sumner testified that he had personally experienced such occurrences.

11. Jerry Pape, a resident of the Silverbow complex and the chairman of SOA's board of directors, testified as to discussions and meetings with the president of LMS regarding leaks within the water service lines the manner in which Silverbow residents are billed for LMS's water service, and LMS's prior repair of water service lines within the complex's boundaries.

12. Don Langohr, a resident of the Silverbow complex and a member of SOA's board of directors, testified as to the aforementioned meetings with LMS regarding financial responsibility for repairs.

For the Defendant

13. John Kircher, President of Lone Mountain Springs, testified as to meetings in 1987 and 1988 with representatives of SOA regarding leaks located within the Silverbow property boundaries, and that those meetings resulted in LMS agreeing to proceed with certain repairs with the issue of financial responsibility to be determined at a later date. In regard to the level of service provided the Silverbow complexes, Mr. Kircher testified that in his opinion such service was reasonably adequate. He also testified that despite diligent efforts to the contrary, malfunctions in telemetry equipment have sometimes resulted in the complete draining of the water tank supplying the Silverbow complex.

14. Raymond J. Tout, Operator of the LMS water system, testified as to the physical arrangement of the various systems that comprise the LMS water system. Mr. Tout also testified that the water lines within the Silverbow complexes were service lines, and he defined service lines as lines that take off from a main and service a particular area. He further testified that the leak detection study and report performed and prepared in September 1990 by Utility Service Associates, Inc. indicated that all the leaks were in the 3-inch pipes within the Silverbow complexes. Mr. Tout estimated that these leaks currently account for approximately 100,000 gallons per day.

15. Defendant argues by exception that Mr. Tout testified that all the leaks that were found were located between the 3-inch pipelines and the individual condominium units. Mr. Tout did in fact answer the following question in the affirmative: "Would it be fair to say, then, that all the leaks that were found between the 3-inch line and the individual units?" The Commission acknowledges that Mr. Tout's answer may be read as being exclusive rather than inclusive of the 3-inch lines and will accept his testimony as such.

16. Jack Schunke, a civil engineer for Morrison-Maierle/CSSA, testified as to the character of the various lines servicing the Silverbow complexes.

17. Gary Sturm, senior project manager with Morrison-Maierlee/CSSA, testified as to Morrison-Maierle's preparation of an appraisal of the LMS's water system and its relevance to LMS's 1980 rate-increase application.

18. William Guza, a certified public accountant with Veltkamp, Stannebein and Bateson, P.C., testified as to the depreciation schedule for LMS asset base.

DISCUSSION

I. EXCEPTIONS OF LMS.

19. Defendant's Combined Exceptions to the Proposed Order and Brief contain a number of arguments that do not address any particular error in the Proposed Order. Defendant clearly has used the exceptions process to introduce its delinquent findings of fact and conclusions of law. At this point in time it would be both prejudicial to the Complainant and highly inappropriate to allow Defendant to abuse the exceptions process in this manner. Therefore, only those exceptions addressing specific error in the Proposed Order will be addressed herein. All other arguments contained in Defendant's Combined Exceptions to the Proposed Order and Brief are deemed to constitute Defendant's post-hearing brief and are hereby rejected as being untimely filed.

II. INTRODUCTION.

20. Two questions are currently before this Commission: 1) Which party is responsible for the repair and maintenance of those pipes contained within the boundaries of the Silverbow complexes; and 2) Whether the service and facilities provided to the Silverbow complexes are adequate? The answer to this second inquiry is, of course, dependent on an antecedent finding as to what services and facilities are in fact being provided by the Defendant. In this regard, our analysis begins with ownership and financial responsibility for the subject-matter pipelines.

III. OWNERSHIP AND RESPONSIBILITY.

21. Both parties have expended considerable energy arguing the application of Section 69-4-511, MCA, to condominium developments. Section 69-4-511(1), MCA, provides:

A property owner is responsible for the costs of constructing privately supplied water service pipelines from the main to his premises and for

maintaining service pipelines from his property line to his premises. The private water service provider is responsible for the cost of maintaining water service pipelines from the main to the owner's property line, except that the property owner shall pay for pipe and other supplies used in maintaining water service lines between the main and his property line.

22. As Defendant correctly argues, Section 69-4-511, MCA, does not distinguish between condominium unit owners and homeowners. Indeed, this section merely governs the relationship between a property owner and a private water utility vis-a-vis the construction and maintenance of water service lines. This relationship is not complicated. The private water utility is responsible for the cost of maintaining the water service line between the main and the owner's property line. The property owner, on the other hand, is responsible for: 1) The cost of constructing the water service line from the main to his or her premises; 2) the actual maintenance of the water service line running from the property line to his or her premises; and 3) the cost of pipe and other supplies used by the private water utility in maintaining the water service line running from the main to the property line.

23. The simplicity of this statutory relationship should, in most cases, make proceedings such as this one unnecessary. However, as will be discussed infra, the facts of this case do not permit such simplicity because: 1) The proper application of Section 69-4-511, MCA, is dependent on customer construction and ownership of the water service pipelines; and 2) the parties here dispute ownership of the water service pipelines.

A. SECTION 69-4-511, MCA.

24. Prior to the passage of Section 69-4-511, MCA, a property owner was responsible for the construction and maintenance of the water service lines running from the main to his or her premises. As evidenced by the well-chronicled experiences of Senator J.D. Lynch, this arrangement presented certain logistical and financial difficulties when it came to customer maintenance of water service pipelines located under streets and other public property. Section 69-4-511, MCA, was subsequently enacted in response to these difficulties. See Mountain Water Co. v. Montana Department of Public Service Regulation, 919 F.2d 593 (9th Cir. 1990) (accepting the district court's

finding that the purpose of the statute is to help assure proper maintenance of customer-owned service lines).

25. This legislative response affected the previous relationship in basically one way: The private water utility was now financially responsible for maintenance of those customer-owned pipelines that were located beyond the customer's real property; and, since customers still owned these pipelines, they remained responsible for the cost of materials and supplies.

26. The logic of Section 69-4-511, MCA, is fairly obvious when one considers the legislative intent was to shift a portion of the oftentimes prohibitive cost of repair and maintenance, including potential liability, from the individual customer to the utility's entire customer base. Of course, the private water utility was the proper conduit for this shifting of costs since the financial burden allocated by Section 69-4-511, MCA, could be recovered and spread over the customer base through the imposition of higher rates.

27. A private water utility's ability to recover the costs imposed by Section 69-4-511, MCA, is crucial to understanding the section's limited application to customer-owned water service pipelines. Both the United States Constitution (5th Amendment) and the Montana Constitution (Article II, Section 29) provide a guarantee against the taking of private property without just compensation. Of course, the ability of a private water utility to recover its Section 69-4-511 costs through the imposition of higher rates ensures that an uncompensated taking does not result. See e.g., Mountain Water.

28. On the other hand, if a customer were obligated to repair and maintain utility-owned pipelines, then an uncompensated and unconstitutional taking would occur since no mechanism exists whereby the customer could recover the costs incurred in the repair and maintenance of the utility's plant.

29. A fundamental rule of statutory construction is that a statute must be construed in a reasonable manner so as to avoid unreasonable results. Darby Spar Limited v. Department of Revenue, 217 Mont. 376, 705 P.2d 111 (1985). To read Section 69-4-511, MCA, as applying to both customer-owned and utility-owned water service pipelines would produce both an anomalous and unconstitutional result where the customer was required to maintain and repair utility-owned

pipelines. Therefore, the Commission finds that Section 69-4-511, MCA, is applicable only to customer-owned water service pipelines.

30. Defendant argues by exception that the above is an unreasonable interpretation of Section 69-4-511, MCA, and that the statute is applicable regardless of ownership. Defendant also claims that the court in *Mountain Water* held that "[c]ustomers of privately owned water utilities in Montana own the water service lines between their premises and the water main the public streets." [sic].

31. Though Defendant failed to provide a citation for the Ninth Circuit's "holding" on the issue of ownership, the language may be found at 919 F.2d 594, under the heading "Factual and Procedural Background." The court did not hold, as Defendant claims, that customers of privately-owned water utilities own the service lines between their premises and the water main. Rather, the court was merely reciting the well known fact that customers of privately-owned water utilities generally do own the service lines running from the main to their premises. Nothing in the Mountain Water decision precludes utility ownership of water service lines.

32. Since Defendant fails to provide an argument that addresses the uncompensated taking that could occur under an ownership-neutral reading of Section 69-4-511, MCA, the Commission rejects Defendant's exception and finds that Section 69-4-511, MCA, is intended to allocate financial responsibility for repair and maintenance of only customer-owned water service pipelines.

B. OWNERSHIP OF 3-INCH PIPELINES.

33. At hearing and in its Proposed Findings of Fact and Conclusions of Law, Complainant alleges that Defendant is the owner of the 3-inch pipelines at issue. This contention is based primarily on the fact that these same pipelines are contained in the LMS annual financial reports filed with this Commission. The Commission finds this contention persuasive.

34. Section 69-3-203, MCA, requires all public utilities to file an annual report with the Commission no later than two and one-half months after the close of accounts. LMS has failed to file annual reports for the last two years, however, and the last annual report filed by LMS was for

the year ending December 31, 1987. That problem aside, Table XVII of the 1987 report, titled Distribution Mains, LMS reports 2,331 feet of 3-inch distribution mains. According to the testimony of Ray Tout all the 3-inch lines are located within the Silverbow complexes.

35. The 1987 Annual Report combined with Mr. Tout's testimony suggests that LMS owns the 3-inch pipelines within the boundaries of Complainant's property. However, LMS contends that the annual reports submitted to the Commission are for reporting purposes and are not indicative of ownership. LMS further maintains that though these 3-inch pipelines appear in a number of its annual reports, SOA is the owner in fact. The facts do not support this contention.

36. Defendant argues by exception that the Commission has mischaracterized Mr. Tout's testimony in regard to the location of the 3-inch lines. However, Mr. Tout did testify that "I know of no 3-inch lines anywhere in the entire system, except possibly for those in Silverbow." Testimony of Mr. Ray Tout, Transcript of Hearing, p. 199, lines 8-10. Therefore, the Commission rejects this exception.

37. At hearing and in its pleadings, LMS acknowledged previous ownership of the 3-inch lines, but alleged that such ownership was terminated by order of this Commission in a 1980 rate increase proceeding (Docket No. 6689, Order No. 4619). According to LMS, the Commission's reduction of the proposed cost valuation of the water plant by \$252,600 for customer contributions in aid of construction was determinative of ownership.

38. LMS's contention here suffers on three fronts. First, though LMS asserts a reduction of \$252,600, the Commission approved a reduction for contributions in aid of construction of only \$125,534 -- this amount was reached using a proportional reduction factor of .497, based on the proportional difference between LMS's original cost figure (\$1,755,645) and that found by the Commission (\$872,500).

39. Second, the Commission made no specific determination regarding ownership. The fact that specific assets were not used to compute the \$125,534 figure logically precludes such a determination.

40. Finally, and most importantly, reductions for customer contributions in aid of construction are not used to affect ownership. Such reductions implicitly assume a utility's ownership

of the whole plant and are used by this Commission to determine the cost of plant on which the utility is entitled to earn a rate of return. In other words, the cost of a utility's plant would not be reduced if ownership were vested with the customer. Further, customer contributions in aid of construction are a onetime cost of service paid by a prospective subscriber, and are used to construct common-use plant owned by the utility. For these reasons, the Commission finds that LMS's ownership was clearly unaffected by Order No. 4619.

41. Defendant argues in its Exceptions that the Commission has misinterpreted the effect of Order No. 4619, and that the Commission backed out 100 percent of the proportionate costs for the contributions in aid of construction thereby terminating LMS's ownership interest. With all due respect to Defendant's argument here, the Commission believes that its interpretation of its own order is indeed correct. There is no language contained in Order No. 4619 to support Defendant's interpretation and, further, Defendant's interpretation is logically inconsistent with the underlying theory of customer contributions in aid of construction.

42. And, while Defendant correctly pointed out that SOA never granted an easement for the pipelines, this lack of an easement by itself cannot contradict the finding of ownership created by the admitted previous ownership and the continued listing of the 3-inch pipelines in LMS's annual report. In this regard, the Commission would note that if LMS lacks the necessary easement, it is LMS's obligation to either obtain the easement from Complainant or institute an eminent domain proceeding.

43. In determining the evidentiary weight that should be accorded an annual report, the Commission acknowledges the testimony of Defendant's witness, Gary Sturm, who maintained that annual reports are not reliable indicators of ownership. While Mr. Sturm's point is well taken, the fact remains that LMS was otherwise unable to establish a legal transfer of ownership to SOA. Though not conclusive of ownership, the 1987 annual report is evidence that LMS's initial ownership, which is undisputed, never ceased. Defendant argues by exception that this conclusion is in error. Defendant does not argue the issue of evidentiary weight given to the annual reports, but instead argues that the mere listing of water pipe on an annual report is not indicative of ownership. This exception is rejected as not being on point.

44. The Commission therefore finds that Defendant is the owner of the water service pipelines extending from the main to the service lines connecting the individual units within the Silverbow complexes. And, since Section 69-4-511, MCA, is clearly inapplicable to utility-owned pipelines, the Commission further finds that Defendant is responsible for any past, present or future repairs and maintenance to these water service pipelines. Both parties filed exceptions on this finding. Complainant argues that Defendant should be responsible for all the water service pipelines, including those connecting the individual units, up to the stop cocks servicing these units. Defendant argues that the facts in the record do not support the conclusion that the 3-inch pipeline is owned by the water utility.

45. In regard to Defendant's exception, the Commission does find that the facts support the conclusion that LMS owns all the water service pipelines running from the main to the service lines connecting the individual units. Defendant does not assail any particular error here and is obviously working in generalities more appropriate to its non-existent post-hearing brief.

46. Complainant's exception, while appealing from the standpoint of practicality, must also be rejected. The evidence that supported a finding that LMS owned the 3-inch pipelines is not present in regard to the smaller diameter pipelines that service the individual units.

IV. ADEQUATE SERVICES AND FACILITIES.

47. Section 69-3-201, MCA, requires every public utility to provide reasonably adequate service and facilities. The testimony presented by witnesses for both sides leaves no doubt that the facilities currently provided to the Silverbow complexes are inadequate. Ray Tout, the person in charge of operating Defendant's water plant estimated that 100,000 gallons of water per day are currently being leaked from the system. In addition, there is uncontroverted testimony from both parties concerning loss of service, water shortages and rationing. In light of the preceding findings on ownership, however, a question arises as to who owns the inadequate facilities.

48. Defendant argues by exception that if its reading of Mr. Tout's testimony in regard to the location of the leaks is correct (i.e., the leaks are not located in the 3-inch pipes), then the leaks

are not in LMS-owned pipelines and no finding of inadequate service and/or facilities can be made against LMS.

49. Assuming that Mr. Tout's assertions concerning the location of the leaks are correct, then Defendant's exception is well-taken. However, Mr. Tout's testimony was based on the leak detection study and report performed and prepared by Utility Service Associates, Inc. (USAI). While Mr. Tout claimed to have accompanied USAI during the study, the resulting report does not identify the leaks per the size or location of the pipeline involved. In the absence of evidence or testimony from USAI itself that specifically identifies the location of the leaks, the Commission is reluctant to find that the leaks are located in any particular location.

50. Without credible evidence to indicate the location of the leaks, the Commission must find for the Complainant on the issue of inadequate service and/or facilities. Complainant clearly met its burden of production on this issue. In fact, the testimony of Mr. Tout concerning the amount of water being leaked only supports Complainant's allegation. At this point, the burden of proof rested with Defendant to establish that its service and/or facilities were not responsible for these problems. Defendant clearly failed to meet this burden.

IV. DEFENDANT'S COUNTERCLAIM.

51. Defendant filed a counterclaim seeking money damages for repairs made to water service lines within real property owned by complainant. Defendant argues by exception that it was error for the Commission not to address this counterclaim. Defendant should note that the Commission does not have the jurisdiction to award money damages and therefore could not provide the relief requested.

CONCLUSIONS OF LAW

52. Based on all of the foregoing, the Commission reaches the following conclusions of law:

53. Section 69-4-511, MCA, is inapplicable to the facts of this case since Defendant is the owner of the at issue water service pipelines.

54. By virtue of the loss of service, shortages and rationing experienced by Complainants, Defendant is in violation of Section 69-3-201, MCA, which requires that every public utility furnish reasonably adequate service.

55. Defendant's failure to file a annual reports for the years 1988 and 1989 is a violation of Section 69-3-203, MCA.

ORDER

THEREFORE, Pursuant to the authority granted by Sections 69-3-102 and 69-3-330, MCA, the Commission hereby orders that:

1. Defendant repair or replace those sections of its water service pipelines serving the Silverbow complexes that are currently leaking by June 30, 1991.

2. Defendant make all other necessary repairs to its water plant as to insure the provision of reasonably adequate service and facilities to the residents of the Silverbow condominium complexes.

3. Defendant file complete and accurate annual reports for the years 1988 and 1989 by April 15, 1991.

4. Complainant take whatever action is required to ensure that its water service pipelines are in good repair.

Done and Dated this 15th day of May, 1991 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

HOWARD L. ELLIS, Chairman

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

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