

Order

Service Date: August 15, 1991

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

* * * * *

IN THE MATTER of the Application)	UTILITY DIVISION
Of the MONTANA POWER COMPANY for)	
Authority to Establish New Rates)	DOCKET NO. 90.1.1
Required to Implement its Gas)	
Transportation Plan.)	DECLARATORY RULING

Introduction

1. Petitioner Montana Oil and Gas Association (Petitioner or MOGA) filed a petition with the Montana Public Service Commission (Commission) for a declaratory ruling in this Docket on April 3, 1990. Assuming that the Commission grants Montana Power Company's request to implement gas transportation, MOGA questions whether §§ 69-3-101 and 69-3-102, MCA, would apply to members of the association selling gas to selected industrial end-users while using facilities owned by Montana Power Company (MPC) to transport the gas. MOGA requests a ruling on whether its members, independent gas producers, would come under the supervision and regulation of the Commission as public utilities for sales relying upon gas transportation facilities owned by MPC.

2. On April 10, 1990 the Commission issued a Notice of Petition for Declaratory Ruling and served copies upon the intervenors and interested persons to the Docket. Timely comments to

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the Petition were filed by MPC, Montana Consumer Counsel (MCC) and Montana-Dakota Utilities Co. (MDU).

The Question Presented

3. Petitioner poses the following question based upon a prospective and unknown outcome in Docket No. 90.1.1.

4. Would the sale of gas by MOGA's gas-producer members to (a) noncore industrial end-users formerly purchasing gas from MPC or (b) local distribution companies utilizing the transportation facilities of MPC constitute the gas-producers as "public utilities" under Montana statutes and PSC rules, where Petitioner does not hold itself out to the public in general as a supplier of natural gas?

Facts Presented

5. MPC in Docket No. 90.1.1 has applied for authority to establish rates for gas transportation. Independent gas-producers would have the right to use MPC's system to transport gas to customers, possibly including some of MPC's present customers. If so, independent producers represented by MOGA would be competing with MPC for sales of natural gas.

6. If the Commission were to determine, based upon these assumed facts, that selling gas on a selective basis would constitute independent producers as "public utilities," then MOGA's members would not sell their gas in this market. MOGA does not want a long-term commitment to sell gas at a regulated price.

Applicable Law

7. Petitioner seeks a ruling that independent gas producers selling gas to former MPC customers, and transporting the gas on MPC transportation facilities would not be "public utilities" subject to the jurisdiction of the Public Service Commission, pursuant to §§ 69-3-101 and 69-3-102, MCA. The text of these statutes follows:

69-3-101. Meaning of term "public utility". (1) The term "public utility", within the meaning of this chapter, shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court, whatsoever, that now or hereafter may 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;
- (b) street-railway service;
- (c) light;
- (d) power in any form or by any agency;
- (e) except as provided in chapter 7, water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities, towns, and villages or elsewhere;
- (f) regulated telecommunications service.

(2) The term "public utility" does not include:

- (a) privately owned and operated water, sewer, or combination systems that do not serve the public;
- (b) county or consolidated city and county water or sewer districts as defined in Title 7, chapter 13, parts 22 and 23; or
- (c) a person exempted from regulation as a public utility as provided in 69-3-111.

69-3-102. 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.

Summary of Comments

8. Montana Power Company. MPC filed a Brief in Support of Petitioner's Motion for Declaratory Ruling. MPC maintains that the transactions as proposed by MOGA do not result in a public utility status for the sellers. The sellers do not intend, and in fact do not have the resources, to serve the general public. The sellers simply will find a limited number of customers and contract with them based on market price, demand, location and load shape.

9. Further, MPC asserts that independent gas producers would not have "public utility" status because production of gas is not monopolistic. Regulation of natural monopolies developed as a substitute for competition, in order to achieve lower costs through economies of scale. The "natural monopoly" under this scenario is the gas transportation "because of the economies of scale inherent in providing pipelines and distribution systems to the general public." By contrast, the sale of natural gas by producers is naturally competitive, as recognized by the federal government in its deregulation of wellhead prices and removal of Federal Energy Regulatory Commission (FERC) jurisdiction over

prices for new gas supplies. FERC in Order No. 436, Docket No. RM85-1-000 (Parts A-D). Therefore, MPC believes the Commission should grant the petition and rule that MOGA's "proposed business" is not a public utility.

10. Montana Consumer Counsel. MCC questions whether MOGA has standing to file for a declaratory ruling as an association of independent gas and oil producers. The association would not itself be subject to, or exempt from, regulation. Declaratory rulings must be binding between the agency and the Petitioner concerning the facts set forth in the petition. ARM 1.3.229. MCC questions further, whether MOGA has set forth sufficient facts to show how MOGA and not its members will be affected by a ruling.

11. MCC also questions what bearing Commission approval of MPC's proposed transportation plan in Docket No. 90.1.1 would have upon the regulatory status of the independent gas producers. "If they cease selling to the gas utility and begin selling to end-users using the Montana Power system to deliver gas to those end-users they are no more or less a public utility than before." MCC Comments, pp. 2-3. A declaratory ruling would be unnecessary if the producer members remain simply producer/sellers.

12. MCC recommends a Commission denial of the requested ruling, or alternatively, establishment of a factual record before ruling.

13. Montana-Dakota Utilities Co. MDU is a public utility providing gas and electric service within four states, including eastern Montana. Only MPC sells more natural gas at retail in Montana. MDU already has flexible gas transportation rates approved by the Commission. Some MDU customers now purchase natural gas in the field which is transported on MDU facilities.

14. MDU maintains that the key component to public utility status of a seller of natural gas is whether the seller delivers the product to the end user on facilities the seller owns, operates or controls.

Discussion and Analysis

15. In their analyses, MPC, MCC and MDU generally agree that MOGA's members would not become "public utilities" simply by selling natural gas and delivering the product on gas transportation facilities owned, operated and controlled by MPC. MPC recommends, therefore, that the Commission grant MOGA's Petition. Paradoxically, MCC and MDU conclude that the Commission should not grant the declaratory relief requested. Alternatively, MCC states that the Commission should first establish a factual record on which to base a declaratory ruling.

16. MOGA contends that pursuant to Lockwood Water Users Association v. Anderson, 168 Mont. 303, 542 P.2d 1217 (1975), Petitioner would not be a public utility. MDU contends that Lockwood does not apply to the hypothetical situation outlined by MOGA. The Lockwood Water Users Association was a nonprofit

association formed to provide water to members of the association. In Lockwood the court found that an entity serving itself does not come under the definition of a public utility. (After Lockwood, the Legislature amended § 69-3-101, MCA, to clarify that the term "public utility" does not include privately owned water and/or sewer systems that do not serve the public.) In Lockwood the association also contracted to furnish water to Anderson, a trailer court developer, on a contract limited to 60 trailer hook-ups.

17. The court in Lockwood concluded that the users association was not a public utility in supplying water to its members on a nonprofit basis through contractual agreements. Lockwood, 168 Mont. at 310. Lockwood does not stand for the principle asserted by Petitioner that any contractual agreements with selected individuals automatically preclude a public utility status. Petitioner's proposed facts are not analogous to those in Lockwood. MOGA is not a nonprofit users association providing service (e.g. water or natural gas) to itself; it is an association of producers and sellers of natural gas. MOGA's members, and not the association itself, propose to enter into contracts to provide natural gas. MDU is correct that Lockwood does not apply to the facts proposed by MOGA.

18. Both MCC and MDU point out that the Commission has not previously regulated these independent gas producers as public utilities. According to MCC a declaratory ruling is unnecessary as long as the producer members continue to act like producers.

MDU states that the determinative factor is whether the producer delivers gas to the end user. MDU cites Gallatin Natural Gas Company v. Public Service Commission, 79 Mont. 269, 279-280, 256 P. 373 (1927), which determined the following question on appeal to be critical: "[d]oes [Gallatin Natural Gas Company] own, operate or control the plant or equipment of the Billings Gas Company for the delivery of or for furnishing, for or to other persons, heat, light or power?" (Emphasis added.) The Commission has not regulated natural gas producers for the production and sale of gas, notwithstanding the appearance of the term "production" in connection with "delivery" and "furnishing" in § 69-3-101, MCA. (See ¶ 20 following.) The operative words are "delivery of" and "furnishing, for or to other persons." Further determinative of public utility status, the natural gas producer must "own, operate, or control the plant and equipment" used to deliver or furnish the natural gas to the end-user, to be a "public utility." § 69-3-101, MCA.

19. Production and sale of natural gas, without the service component of furnishing or delivery on pipeline facilities owned, operated or controlled by the producer, has not been regulated by the Commission. The United States Supreme Court commented as follows:

Producers of natural gas cannot usefully be classed as public utilities. They enjoy no franchises or guaranteed areas of service. They are intensely competitive vendors of a wasting commodity they have acquired only by costly and often unrewarded search. Their unit costs may rise or decline with the vaga-

ries of fortune. Permian Basin Area Rate Cases, 390 U.S. 755, 756-57 (1968).

20. "Production" of natural gas for sale as a commodity does not mean the same as the term "production" in conjunction with "delivery" and "furnishing" in § 69-3-101, MCA. Under the statute, "production" implies the service component of producing "heat," "light," or "power" for other persons. Producers of natural gas, however, are in the business of selling their product to others who make arrangements for delivery, furnishing and production of heat, power and light. Omission of the term "production" in Gallatin Natural Gas Company, with subsequent emphasis upon "delivery" and "furnishing," suggests that "production" in § 69-3-101, MCA, is subsumed under the classification of service, i.e., the act of providing to others on a system under the control of the utility. Congress reserved to the states the power to regulate the production and gathering of natural gas. Northwest Pipeline v. F.E.R.C., 905 F.2d 1404, 1407 (10th Cir. 1990). However, in regulating rates and service, this state Commission has not regulated the production of natural gas or the sale of this commodity, without the component of service, that is, transportation to and/or distribution to the consumer(s) or purchasers.

21. Petitioner and MPC incorrectly focus upon the issue of limiting service on a contractual basis as the deciding factor in a public utility determination. Section 69-3-101, MCA, provides that a "public utility," pursuant to Title 69, Chapter 3,

shall embrace every corporation, ... company, individual, association ..., their lessees, trustees, or receivers ... that ... own, operate, or control any plant or equipment, any part of a plant or equipment ... within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations ... (a) heat; ... (c) light; [or] (d) power in any form or by any agency[;]

Pursuant to this definition an entity may be a public utility if it provides service to only one person other than itself or its members on facilities owned, controlled or operated wholly or in part by the entity selling the commodity.

DECLARATORY RULING

1. An entity undertakes public utility service subject to Commission regulation if it engages in activity within the meaning of § 69-3-101, MCA. If the entity owns, operates or controls plant or equipment, or a part of such facilities, in order to provide (produce for, furnish for or deliver to) others heat, light or power in any form, then it is providing public utility service. There are two key elements to public utility status under this definition: (1) the entity owns, operates or controls the facilities; and (2) the facilities are used to provide service to someone other than the entity.

2. If the independent gas producer does not own, operate or control the delivery facilities or engage in furnishing or delivering the natural gas to the purchaser(s), it will not be subject to Commission regulation under § 69-3-102, MCA, for a

sale of natural gas. Therefore, if it sells the gas to be delivered on the facilities of another (e.g., MPC), it will not come under the definition of "public utility" in § 69-3-101, MCA, provided that it does not operate or control these facilities by some sort of agreement with the owner of the facilities.

3. If producer/sellers continue to act like producer/sellers, their nonregulated status should remain the same. A producer/seller engaging in its traditional function of producing and selling gas in the field has not been regulated as a public utility, without engaging in the business of delivery to the end-user. The quantity is immaterial, provided that the sale is made in the field and the producer/seller has no control over any service component of delivery. Whether the sale is to one customer or a limited number of customers, as opposed to "the public in general," is also immaterial to a determination of public utility status. A producer may potentially be subject to regulation for a contractual agreement to sell to one other entity, if the producer owns, operates or controls facilities and engages in delivery of the gas to the end-user/purchaser. Whether the agreement involves public service and dedication of property to the use of even one member of the public would be a question of fact.

4. In conclusion, if the natural gas producers are merely selling their commodity and not engaging in service and delivery to the end-user, then they should not come within the definition of "public utility" in § 69-3-101, MCA, nor be subject to Commis-

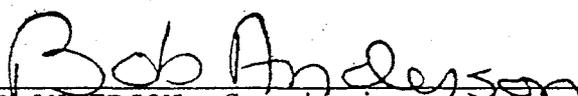
sion regulation pursuant to § 69-3-102, MCA. Their continued unregulated status based upon use of transportation/delivery facilities they do not own requires that they also do not operate or control these facilities or the delivery of their product.

Done and Dated this 6th day of August, 1991 by a vote of 5-0.

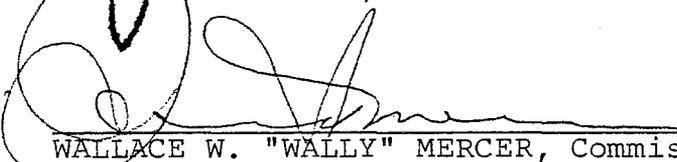
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


HOWARD L. ELLIS, Chairman

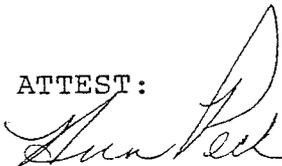

DANNY OBERG, Vice Chairman


BOB ANDERSON, Commissioner


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.

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