

Service Date: November 18, 1994

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

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IN THE MATTER OF the Application) UTILITY DIVISION
of LONE MOUNTAIN SPRINGS WATER)
COMPANY for Authority to Increase) DOCKET NO. 92.9.55
Rates and Charges for Water)
Service to its Big Sky, Montana,) ORDER NO. 5660g
Customers.

ORDER ON RECONSIDERATION

Introduction

1. On August 24, 1994 the Montana Public Service Commission (PSC) issued a Final Order (Order No. 5660f) in the above-entitled matter. The matter is primarily a utility rate case filed by Lone Mountain Springs Water Company (Lone Mountain or LMS), a private water utility, but incorporates complaints by several of Lone Mountain's customers (ratepayers or subscribers) as well. Pursuant to ARM 38.2.4806, reconsideration of the Final Order now has been requested.

2. Lone Mountain, the applicant and defendant, and the Montana Consumer Counsel (Consumer Counsel or MCC), an intervenor, have both filed requests for reconsideration. The remaining rate case intervenors, Big Sky Owners Association, West Fork

Properties, and Westfork Meadows Owners Association, have not requested reconsideration.

3. Two complainants, Hidden Village Owners Association (Hidden Village) and Silverbow Owners Association (Silverbow), have also filed for reconsideration. As complainants they have party status in regard to their complaints and, insofar as their complaints are concerned, standing to request reconsideration is acknowledged (for both the sole issue is pool and tract charges).

However, neither is a party to the rate case as neither intervened in that matter and, insofar as rate case issues are concerned, standing to request reconsideration is denied. ARM 38.2.4806, provides that reconsideration is available only to one who is of "party" status.

Parts of the Final Order Relevant to Reconsideration

4. As part of the Final Order, the PSC found that Lone Mountain has assessed a quarterly "pool" charge since 1991 and a quarterly "tract" charge since 1978 without specific tariffs to do so. The PSC concluded that Lone Mountain should "refund" these unlawfully collected charges, by amortizing the total amount collected to future revenues through a three year period, with interest on the balance at 10 percent per year. To implement this the PSC required Lone Mountain to research and compute

the amounts collected, in the process presenting the results to each billed customer for review and comment.

5. The PSC also found that Lone Mountain had been providing water to a local skiing facility (Big Sky) for snow making purposes, without charge, since 1980. The PSC concluded that the revenues lost should be imputed to Lone Mountain. To implement this the PSC required Lone Mountain to compute the total charges which should have been assessed and amortize that amount as operating revenue over a three year period, with interest on the balance at 10 percent per year.

6. On another point, in its rate case Lone Mountain proposed converting its uniform flat rate by customer class to a variable flat rate based on "single family equivalents." As part of the Final Order, the PSC found Lone Mountain's support for its proposal questionable in accuracy, primarily as to whether the proposal had included sufficient equivalents. However, even with the inaccuracy, the PSC concluded that the concept underlying the proposal was superior to Lone Mountain's existing uniform flat rate and determined that it would approve Lone Mountain's proposal, adjusting the equivalents upward, by 15 percent (producing a more acceptable figure, with remaining doubt favoring the rate-payer).

7. In the part of the Final Order regarding return on equity (and its effect on cost of capital and capital structure), the PSC found that Lone Mountain's operations as a public utility have been substantially inefficient and have been exercised in disregard to good business practices and statutory obligations as a public utility. The PSC concluded that Lone Mountain's return on equity should therefore be lower than a return on equity (approximately 12 percent) that might be approved for an efficient utility in the same general class. The PSC concluded that Lone Mountain's return on equity would therefore be reduced to 10 percent.

Issues and Analyses

8. The first issue on reconsideration is whether the PSC's conclusion on Lone Mountain's pool and tract charges and the PSC's conclusion on Lone Mountain's providing of water for snow making at no charge are inconsistent. On this point the Consumer Counsel argues that the PSC's requirement that Lone Mountain refund pool and tract charges that were assessed without tariffs is inconsistent with the PSC's requirement that Lone Mountain "impute revenues foregone" (revenues lost) in supplying water without charge, to the local skiing facility for snow making purposes.

9. The Consumer Counsel appears to reason that the PSC's conclusion that Lone Mountain, in the absence of tariffs, could not assess pool and tract charges, is inconsistent with the PSC's conclusion that Lone Mountain, in the absence of a tariffs, should have assessed snow making charges. The Consumer Counsel's interpretations are incomplete and therefore its assumption that the rulings should be consistent is incorrect.

10. Complete analysis of the pool and tract services and the snow making service shows that some material elements are the same, but most are significantly different. The differences justify conclusions that are different ("different" is not "inconsistent"). The elements that are the same include that Lone Mountain, as a public utility, should have charged for pool and tract services and should have charged for snow making service, but, for both, only according to tariffs.

11. The remaining material elements, required for a complete comparison, are significantly different:

a. The costs of pool and tract services were considered as utility costs in Lone Mountain's next previous rate case (Docket No. 6689, Order No. 4619, May 12, 1980). However, in the design of rates Lone Mountain included no specific tariff for pool or tract services. Apparently the costs associated with pool and

tract services were to be assessed through one of the designated tariffed rates (if any were applicable) or be "absorbed" by other rates. Neither was done, as Lone Mountain, without approval, simply created and implemented a specific rate for pool and tract services.

b. The costs of snow making services were not considered as an element in Lone Mountain's next previous rate case (or any previous rate case). Lone Mountain, without approval, simply created and implemented the service without charge. Lone Mountain should have established the costs associated with snow making service in a rate proceeding and had approved tariffs in place before providing the service. In the absence of these, Lone Mountain simply should not have provided the service.

12. Lone Mountain's errors were in providing the pool and tract services without respect to tariffs and the snow making services without tariffs at all. Lone Mountain compounded the errors by charging for pool and tract services, for which associated costs were already met by existing rates, and not charging for the snow making service to which associated costs were never established. It is not a point of whether Lone Mountain should have charged for services. Lone Mountain should have charged for providing pool and tract services, but not without following

tariffs. Lone Mountain should have charged for water for snow making, but not without first having tariffs to follow. In the case of pool and tract, Lone Mountain unlawfully assessed charges. In the case of snow making, Lone Mountain unlawfully incurred associated costs and provided services without charge. These are the distinctions justifying the difference in the PSC's conclusions.

13. The next issue is whether the PSC's conclusion on pool and tract charges must be modified because of statutes of limitations. Lone Mountain argues on reconsideration that, because of a statute of limitations, it is not liable, and the PSC's ordered refund is barred, for charges assessed prior to two years before the date of the customers' related formal complaints (December, 1992, through May, 1993). In support of its argument, Lone Mountain references Section 27-2-211(1)(c), MCA, which it suggests establishes that two years is the period prescribed for commencement of an action upon the type of liability in issue.

14. The PSC does not necessarily agree or disagree that statutes of limitations, other than those contained within statutes administered by it, generally affect the extent to which the PSC might be able compel a public utility to take certain action. The PSC also does not agree or disagree that, if general

statutes of limitations do apply, Section 27-2-211(1)(c), MCA, would be the one controlling in the instant case.

15. Be that as it may, the defense that a statute of limitations precludes a certain claim is specifically designated an affirmative defense in law. Rule 8(c), M.R.Civ.P. As an affirmative defense, it must be pleaded affirmatively -- it must be raised in the pleadings (notice of the defense must be within the pleadings). Lone Mountain did not raise statutes of limitations as a defense in its June 17, 1993, answer to the complaints or any other filing that could be deemed a pleading.

16. Statutes of limitations, as one of the specifically designated affirmative defenses, cannot be raised as a defense at a time later than the pleadings, including, as in the instant case, for the first time on reconsideration. Lone Mountain's request for reconsideration on the basis of statutes of limitations is therefore denied.

17. The next issue is whether the PSC's conclusion on pool and tract charges should be extended to periods prior to 1978. Hidden Village and Silverbow argue that there were pool and tract charges assessed prior to 1978 and that these should be included in calculating the "refund" that Lone Mountain is required to account for.

18. There may have been quarterly tract charges prior to 1978. It appears that quarterly pool charges were something which did not develop until 1991. However, in regard to the tract charges, the best the record can support is that some of the association ratepayers merely "believed" that there were quarterly tract charges prior to 1978. This is not enough to establish that there were. The PSC affirms its earlier conclusion requiring Lone Mountain's review and calculation of tract charges beginning in 1978.

19. The next issue is whether the PSC's conclusion on pool and tract charges equitably distributes the required "refund." Silverbow argues that pool and tract charges should be refunded specifically to those improperly charged in the first instance, not to all customers through some adjustment to overall revenues. Hidden Village argues that the PSC's apparent method for distribution of the refund, through amortization in rates to all subscribers is not equitable, as only the association level customers actually stood the overcharges to begin with.

20. On this point the PSC agrees. Although an argument might be made to the contrary, it now appears that the better argument is that presented by Hidden Village and Silverbow. The Final Order will be amended accordingly. The PSC will leave it

to the associations and association members to determine further equitable distribution of the refunds (to the extent that individual association members might have contributed through membership, but do not now directly benefit).

21. The next issue is whether the PSC's decision on Lone Mountain's providing water for snow making at no charge violates the rule against retroactive ratemaking. Both Lone Mountain and the Consumer Counsel argue that the PSC's requirement that Lone Mountain "impute revenues foregone" violates the rule. The PSC disagrees. The requirement imposed by the PSC is not subject to the rule.

22. The rule against retroactive ratemaking preserves the integrity of the ratemaking process. However, when a public utility has engaged in unlawful activities that affect revenues or rates, preserving the integrity of the ratemaking process is no longer a valid consideration (to the extent of the violation). Under such circumstances the integrity of the process already has been impaired by the unlawful acts and the remaining question is simply what remedy should be implemented. The rule does not act as a shield against remedies imposed for unlawful activities which have diminished the integrity of the ratemaking process themselves. Lone Mountain's supplying of water for snow making

purposes was done in violation of the law. The rule against retroactive ratemaking does not bar any remedy available, including adjustment to future revenues.

23. The next issue is whether the PSC's conclusion on Lone Mountain's calculation of single family equivalents is arbitrary.

Lone Mountain argues that the PSC's adjustment is arbitrary, as the number of single family equivalents established in the record was "unchallenged." Lone Mountain argues that it is arbitrary and unlawful for the PSC to base ratemaking on what it knows to be the product of inaccuracy and guesswork. Lone Mountain suggests that it be allowed to use its current rate methodology until it can recalculate the single family equivalents and present those figures in a later hearing.

24. The PSC disagrees. Lone Mountain proposed the change in the system and convinced the PSC that the proposed system was preferable to the existing system. However, Lone Mountain's calculation of single family equivalents was disputed, not by way of any substitute calculation, but to the degree that it clearly remained uncertain on the side of the calculation being low. On such matters the PSC can call upon its own expertise and experience in its evaluation. It did so here, concluding that, with the adjustment, Lone Mountain's proposal was sound.

25. The final issue is whether the PSC's conclusion on Lone Mountain's return on equity is arbitrary. Lone Mountain contests the PSC's conclusion on return on equity, arguing that the 12 percent return on equity was unchallenged in the record and there is no basis for the PSC's reduction to 10 percent. Lone Mountain describes the PSC's action as a "unilateral" action, unreasonable, arbitrary, and capricious.

26. The PSC affirms its earlier conclusion. Lone Mountain made no affirmative case whatsoever on return on equity. There is a rational basis for the PSC's conclusion in the record and in the reasoning contained in the order: (a) the return on equity for efficient utilities in the general category of Lone Mountain is likely to be 12 percent; (b) Lone Mountain is not an efficient utility when compared to such utilities; (c) Lone Mountain needs an imposed incentive to become a efficient utility; and (d) a 2 percent reduction to return on equity is sufficient incentive for Lone Mountain to become efficient.

27. Lone Mountain is not entitled to be authorized a return on equity that might be earned by an efficient utility. It would simply be poor regulation to allow otherwise.

28. Final Order (Order No. 5660f) is, by this reference, adopted herein in its entirety, but with the modifications as follows.

29. In the Final Order the PSC concluded that Lone Mountain should "refund" the unlawful pool and tract charges, by amortizing the total amount collected to future revenues through a three year period, with interest on the balance at 10 percent per year.

30. The PSC modifies that provision to the extent that Lone Mountain shall amortize the total amount unlawfully collected, through a three year period, with interest at 10 percent, to future revenues attributable to the ratepayers who were assessed the unlawful charges. Roughly, 3/36 of the total amount, plus interest, would be credited to the affected class of ratepayers per quarter.

31. In regard to revenue requirements, to enable the PSC to determine the appropriate revenue increase to be authorized, Lone Mountain was required to file a revised revenue requirement calculation in conformance with the Final Order. The Final Order is modified to include that the revised revenue requirement calculation shall also be in conformance with this Order on Reconsideration, insofar as any provision of it may be directly

applicable. After receipt of Lone Mountain's filing the PSC will issue the final revenue requirements order.

ORDER

The Public Service Commission, being advised of all premises, HEREBY ORDERS that the requests for reconsideration of Order No. 5660f are GRANTED IN PART AND DENIED IN PART as explained above.

Done and dated this 14th day of November, 1994, by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter.
Judicial review may be obtained by filing a petition for
review within thirty (30) days of the service of this
order. Section 2-4-702, MCA.