

Service Date: April 19, 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 COMPLAINT OF) UTILITY DIVISION
Stone Container Corporation,)
Complainant,)

DOCKET NO. 93.12.62

-vs-)

Montana Power Company,)

ORDER NO. 5772a

Defendant.)

ORDER ON RECONSIDERATION
BACKGROUND

1. On December 3, 1993 Stone Container (Stone) filed a complaint against the Montana Power Company (MPC) alleging certain improper conduct by MPC in its application of the Montana Public Service Commission's (Commission) Least Cost Planning (LCP) rules (ARM 38.5.2001-2012) to resources offered by Stone in response to MPC's request for proposals (RFP) to supply electricity resources. On February 15, 1994 the Commission issued Order No. 5772 dismissing Stone's complaint. The Commission reasoned that 1) a general rate case is the appropriate place to evaluate utility resource choices, 2) the Commission does not perform ongoing evaluations to determine whether each utility resource choice is prudent, and 3) Stone's complaint appears to invite the commission to preapprove certain resources.

2. On February 25, 1994 Stone filed a motion for reconsideration of Order No. 5772. In support of its Motion Stone argues 1) the Commission is required by law to hold a hearing on Stone's Complaint, 2) sound policy regarding the Commission's LCP guidelines dictates that a hearing should be held, and 3) the relief requested by Stone does not require Commission preapproval of a specific resource.

Discussion

3. Stone contends that the Commission has jurisdiction over its complaint, that this Docket is a contested case and, therefore, Stone is entitled to a hearing. Stone argues that the Commission has jurisdiction under § 69-3-321, MCA, which reads in relevant part:

(1) The Commission shall proceed ... to make such investigation as it may deem necessary upon a complaint made against any public utility by ... any ... corporation ... affected thereby, that: (b) any ... practices, or acts ... affecting [utility service] ... [are] in any respect unreasonable, insufficient, or unjustly discriminatory; ...

(2) No order affecting such ... practices, or acts complained of shall be entered without a formal hearing, Stone also cites to the definition of "contested case" as: "... a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for a hearing.'" § 2-4-102(4), MCA. Stone concludes that this Docket is clearly a contested case and thus "... all parties must be afforded an opportunity for hearing after reasonable notice." § 2- 4 - 601 (1), MCA .

4. Stone's arguments are without merit. While it is obviously true that the Commission has certain regulatory jurisdiction over MPC, including the jurisdiction to hear complaints against MPC, this does not mean that the Commission is required to hold a hearing on every complaint filed. Section 69-3-321, MCA, states that the Commission shall investigate complaints against public utilities as it deems necessary, and that 1, the Commission enters an order affecting the practices or acts of the utility complained of, it must first hold a hearing. This leaves the option to not hold a hearing if, after investigation, the Commission determines that it will not issue an order affecting the acts or practices of a utility.

5. An important part of an investigation into a complaint against a public utility is to determine whether the complainant, assuming the facts presented, is entitled to the relief requested. In this case Stone asserts that the LCP guidelines create rights in resource providers. This is not correct. The LCP guidelines are exactly that -- guidelines. They are intended to be a guide for utilities to use in their resource selection process. As noted in Order No. 5772, the guidelines do not change the rate making relationship between utilities and the Commission, and they do not require particular investment decisions. The LCP guidelines do not create rights in potential resource providers -- whether those who participate in RFPs or otherwise. With or without the LCP guidelines, utilities are generally free to make resource choices as they see fit. The Commission then determines how those resource choices are treated for rate making purposes. Generally speaking, regulation attempts to ensure that unreasonable utility decisions are not reflected in rates. It does not create in utilities a legal duty to make reasonable decisions. The LCP guidelines are simply an

attempt to reduce the risk of unreasonable decisions to ratepayers, utilities and society. Stone misunderstands the nature of the LCP guidelines, and this leads it to erroneous legal conclusions about its right to a hearing in this case.1

6 . Therefore, since Stone has no legal right to sell resources to MPC, and MPC has no duty under public utility law to buy resources from Stone, Stone is not entitled to any relief.

The Commission arguably has broad authority to manage public utilities. Section 69-3-102, MCA, states in part, "The commission is hereby invested with full power of supervision, regulation, and control of ... public utilities" The extent of that authority, however, is not entirely clear under Montana law. By refusing to notice a hearing and exercise jurisdiction over the MPC resource selection process criticized by Stone, the Commission does not concede that it may never intercede in utility management decisions, or necessarily that "pre-evaluation of future resource decisions of MPC or anyone else is not within the purview of the Commission." Answer of MPC, p. 3. Traditionally, the Commission has not attempted to exercise direct supervisory control over financially healthy utilities that have demonstrated that they can competently provide adequate service. The Commission has, however, asserted certain management authority over utilities (e.g., the former Butte Water Company) when poor financial conditions and incompetent or disinterested management threatens adequate service. And because Stone has not complained of anything to which it is entitled, the Commission may exercise its discretion and deny a hearing. Contrary to Stone's contention, this proceeding is not a contested case and no hearing is required.

CONCLUSIONS OF LAW

1. The Commission has the power to supervise, regulate and control public utilities under its jurisdiction. § 69-3-102, MCA.
2. The Commission's Least Cost Planning rules do not change the fundamental rate making relationship between utilities and the Commission. ARM 38.5.2001(3).
3. Public utility law generally creates no right in a resource provider to sell, nor obligation in a utility to purchase.
4. The Commission may investigate a complaint against a public utility in a manner it deems appropriate. § 59-3-321(1), MCA.
5. The Commission is not required to exercise more of its power than it determines appropriate. Montana Consumer Counsel v. PSC and MPC, 168 Mont. 180, 187, 541 P.2d 770, (1975).
6. The Commission may determine that a complaint against a public utility is most appropriately addressed in a general rate case.
7. The Commission has the discretion to determine the most appropriate and effective method for reviewing the prudence of utility management decisions.

ORDER

NOW THEREFORE, the Motion of Stone Container for reconsideration of Order No. 5772 is Denied.

Done and Dated this 11th day of April, 1994 by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman
(Voting to Dissent)

BOB ROWE, Vice Chairman
(Voting to Dissent - Attached)

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner

DANNY OBERG, 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. _

DISSENT OF COMMISSIONER ROWE
DOCKET NO. 93 .12 .62, ORDER NO. 5772a

My dissent from the Commission's initial order in this case acknowledged the majority's attempt to act consistently with the Least Cost Planning rules' focus on "guidance" and avoidance of specifying outcomes or particular investments. ARM 38.5.2001(4). On reconsideration, the majority specifically rejected an alternative which would have strengthened least cost planning in a manner consistent with the Commission's view of the most appropriate level of review of electric least cost plans.

Docket 93.3.9 concerns MPC's electric least cost plan. The Commission issued a "Statement" in that docket pointing out deficiencies in MPC's plan. Pursuant to the Commission's

Statement, MPC resubmitted its plan. Although the Commission has taken no further action on the resubmitted plan, the docket remains open. In the present case, a majority of the Commission expressly rejected the option of reopening the comment period on MPC's resubmitted least cost plan, allowing "Stone Container (and others) to state their concerns with the plan in that most appropriate venue. The Commission would then have been able to address the issues raised by Stone as part of their consideration of the revised MPC plan.

The Commission's action on reconsideration leaves unaddressed the issues raised in my dissent from the original order:

1. Is eventual review in revenue requirements proceedings always adequate?
2. Will parties with real interests in the utility's resource choices still remain, and will they have adequate incentive to raise those issues two years after the fact?
3. Is threatened rate base denial always an adequate sanction?
4. Does dismissal of the complaint inadvertently signal utilities that integrated resource planning does not require genuine change in utility resource planning and acquisition?
5. Does dismissal inadvertently signal other parties that vigorous participation in the IRP process will not be productive?

RESPECTFULLY SUBMITTED this 15 day of April, 1994.

BOB ROWE
Vice Chair

