

Service Date: April 12, 1995

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

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IN THE MATTER OF MONTANA-DAKOTA)	UTILITY DIVISION
UTILITIES COMPANY, Application to Revise)	
the Gas Cost Tracking Adjustment Procedure)	DOCKET NO. 95.1.2
to Include a Gas Purchase Risk Management)	
Program (Hedging).)	ORDER NO. 5838

PROCEDURAL ORDER

Introduction

On March 21, 1995 the Public Service Commission (PSC) issued a Proposed Procedural Order establishing, subject to objections, the schedule and procedure to be followed in this Docket. No party filed objections to the proposed schedule. However, in regard to procedural requirements, on March 31, 1995, Montana-Dakota Utilities Company (MDU) filed several objections.

MDU Objections

Objection 1. MDU objects to paragraph 4, which reads:

Unless otherwise stated in this Procedural Order the procedure governing this docket is set forth in applicable provisions of: (a) Title 69, MCA, public utilities; (b) Title 2, Chapter 4, MCA, MAPA; (c) ARM Title 38, Chapter 2, procedural rules of the PSC; (d) tariffed procedures; and (e) previous Orders of the PSC bearing specifically on the procedure in this docket.

MDU argues that general reference to "(a) Title 69, MCA, public utilities; (b) Title 2, Chapter 4, MCA, MAPA; (c) ARM Title 38, Chapter 2, procedural rules of the PSC;" is confusing as to the procedures being contemplated. It suggests that specific sections be referenced.

The PSC will not reference the specific sections, but recognizes that the Order does not identify the matter as a "contested case." To eliminate any doubt in this regard the PSC will amend the sentence at the beginning of the paragraph to read "[u]nless otherwise stated in this Procedural Order the procedure governing this ~~docket~~ contested case is set forth in applicable provisions of...."

MDU also argues that the language "(d) tariffed procedures; and (e) previous Orders of the PSC bearing specifically on the procedure in this docket" should be supplemented by an identification of the specific tariffs and orders so that MDU will be fully apprised of the procedures which must be used. The PSC disagrees. MDU is responsible for knowing which tariff provisions (if any) and prior order provisions (if any) are applicable to the present matter.

Objection 2. MDU objects to paragraph 5, which reads:

Copies of all pleadings, motions, discovery requests, discovery responses, prefiled testimony, and briefs shall be filed with the PSC and served on all parties ("parties" includes MDU and all intervenors). In the case of a filing directed to the PSC, such as motions, testimony, and briefs, the original and 10 copies shall be filed. Service upon the parties shall be upon each party's attorney of record and such other individuals as may be reasonably designated by the attorney of record. The parties may agree to limit service of discovery responses except for service upon the PSC.

MDU argues that, primarily because of expense, the requirement should be that discovery responses only routinely be served on the party requesting the discovery and the PSC. It suggests that the requirement should include, for other parties to obtain discovery responses, a minimal showing why they are entitled to it or have a need for it (including consideration of relevance and the burden of producing it). MDU suggests that the last sentence (allowing the parties to agree to limit service of discovery responses except for service upon the PSC) does not resolve the problem, as one party might refuse to agree to the limitation.

The PSC prefers to leave the requirement for service and filing of responses to discovery as is. MDU (or any other party) can communicate with the other parties in regard to discovery responses to see if limitations on service can be agreed to. Otherwise the parties are entitled to the responses.

Objection 3. MDU objects to paragraph 13, which reads:

The PSC contemplates a complete identification of issues prior to the time of hearing. Introduction of new issues or data in new areas at the time of hearing will be carefully scrutinized and will be subject to disallowance unless reasonably related to issues earlier identified in the application, prefiled testimony, or proceedings.

MDU argues that the first sentence arguably permits a hearing on issues not addressed in the testimony. It comments that former Procedural Orders had a first sentence reading "[t]he Commission contemplates a progressive narrowing of issues as prefiled testimony proceeds from direct to rebuttal" and that this older language should be used, as it clearly indicates that the hearing is upon issues addressed in the prefiled testimony.

The PSC does not agree that the previous language clearly indicated what MDU asserts. Furthermore, the new language more accurately reflects what should be the case -- issues are formulated throughout the process, but must be identified prior to hearing (at a reasonable time prior to hearing), and the hearing will generally not be on issues that have not been so identified.

Objection 4. MDU objects to paragraph 20, which reads:

Any party to this proceeding having responded, itself or through agents, to written discovery from any other party or the PSC, shall have all persons authoring each response present and available as a witness at the hearing for the purposes of introduction of the discovery and cross-examination thereon. Reasonable alternatives to this requirement, such as waiver of objection to introduction absent the author and waiver of right to cross-examine, agreed to by the parties may be accepted if approved by the PSC. Written discovery (not including transcripts of depositions on oral examination) and data requests will not be introduced at hearing unless done in accordance with applicable rules of evidence and through an appropriate witness subject to cross-examination or upon stipulation approved by the PSC.

MDU argues that this paragraph mixes the discovery process with the procedure to compel attendance of witnesses. MDU argues that the PSC does not have the power to directly compel the attendance of witnesses at its proceedings (referencing § 69-3-327, MCA). MDU argues that the paragraph essentially allows any party to compel attendance of witnesses, simply by issuing discovery. MDU argues that a party must concede the PSC's power or give up the fair hearing requirements required to ensure due process.

The PSC might revisit this procedure at some time in the future, but not on the basis of MDU's arguments. This requirement is not significantly different than the requirement of having

those authoring prefiled testimony to appear at hearing. For the time being, there is no reasonable practical or legal basis for MDU not to provide the witnesses responding to written discovery at hearing. MDU might consider that most discovery is through data requests that generally can be answered by one in MDU that will be at the hearing anyway. Also the PSC disagrees that it cannot directly compel the attendance of witnesses. Section 2-4-104, MCA, confers power in the PSC to issue subpoenas. If MDU believes that the procedure is being somehow abused by the parties to this docket (is not for legitimate discovery and evidentiary purposes) the PSC will certainly entertain a motion to resolve the problem.

Procedural Order

The PSC hereby orders that, with the amendments identified above, the March 21, 1995, Proposed Procedural Order is, by this reference, adopted and incorporated herein as the Procedural Order governing this Docket.

Done and dated this 10th day of April, 1995, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

NANCY MCCAFFREE, Chair

DAVE FISHER, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)