

Service Date: February 12, 2004

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

IN THE MATTER of a Commission)	
Investigation of Electricity)	UTILITY DIVISION
Market Activity Affecting Retail)	DOCKET NO. D2004.2.21
Customers During the Period 2000)	ORDER NO. 6531
through 2001)	(DOCKET NO. D2003.7.87)
)	(ORDER NO. 6529)

ORDER INITIATING INVESTIGATION

BACKGROUND

On June 30, 2003 the Commission received a filing, “Petition of the People of the State of Montana, ex rel. Mike McGrath, Attorney General, Flathead Electric Cooperative, Inc. and Roes 1-1000 for Rate Refunds” (hereafter “Petition” or “AG Petition”). At various places in the opening pages of the Petition the action requested of the Commission was stated as follows: “[The Commission should] issue rate refunds for excessive rates paid during 2000 and 2001 to all sellers of energy or capacity subject to the Commission’s jurisdiction that manipulated the western energy market.” p. 1. “This Petition seeks relief from all sellers of energy or capacity subject to the Commission’s jurisdiction involved in the illegal manipulation of the western energy markets in 2000 and 2001.” p. 2.

This Petition seeks to remedy the excessive rates charged to Montana’s ratepayers due to the ongoing manipulation of wholesale energy prices and supply, which resulted in drastic energy shortages and price increases. Petitioners seek refunds of the unjust and unreasonable charges. Petitioners further seek the cancellation of the licenses of the market manipulators who are licensed by the Commission to market electricity and/or natural gas in Montana to retail customers.

p. 4.

On July 24, 2003 the Attorney General (AG), Flathead Electric Cooperative and Roes 1-1000 (Petitioners) submitted “comments” on their own petition. In their comments Petitioners sought to “clarify the intent of the Petition and repeat their request for investigation and relief in the form of a rate refund.” p. 2. They disclaimed any

request, “[t]hat the Commission order any rate refunds to wholesale customers; or [t]hat the Commission order any damages to be paid by the utilities.” Id. Petitioners described their “specific requests” as follows:

That the Commission investigate wholesale and retail electricity and natural gas markets to ascertain the effect of any market manipulation on Montana’s retail customers;

That the Commission order rate refunds and interest on those refunds to retail customers in the amount of electricity and natural gas rates that such customers paid during 2000 and 2001 in excess of rates that they would have paid in an unmanipulated and competitive market; and

That the Commission suspend the license of and impose the maximum penalty of \$1,000 per day on any utility that the Commission finds engaged in fraudulent, deceptive, anticompetitive, and /or abusive practices that affected retail electricity and/or natural gas prices in Montana .

Id.

On August 7, 2003 the Commission issued a Notice of Opportunity to Comment on Petition, establishing a comment deadline of September 5, 2003. The Commission served the Notice on each of the numerous entities mentioned in the Petition. The Notice asked for,

comments on the jurisdiction of the Commission over the subject matter of the Petition and the persons named in the Petition;... on whether, and the degree to which, the Commission can effect a remedy for the market manipulation alleged in the Petition;... on the specific remedies sought by the Petitioners;...[and] on the activities of other decision makers, state and federal, to address the concerns raised by petitioners, including the effects of those activities on any action the Commission might take in response to the Petition.

p. 2. Timely comments in response to the Notice were filed by PacifiCorp, Powerex Corporation, Avista Corporation and Avista Energy, Inc. (jointly). Energy West Incorporated filed late comments and a request to file late comments on November 18, 2003.

On November 10, 2003 Petitioners filed a “Notice of Additional Authority and Additional Comments.” The purpose of the filing was to advise the Commission of certain relevant (in the opinion of the Petitioners) recent activity of the Oregon Public Utility Commission, and to respond to the comments of PacifiCorp, Powerex, and Avista. The filing also implicitly, if not explicitly, further clarified and limited the Petitioners’ original request by

indicating that Petitioners seek only an investigation into certain energy market activities, but that a determination of remedies, if the results of the investigation support seeking remedies, will be determined at a later date.

On December 16, 2003 the Commission met to consider the AG Petition and subsequent comments and documents filed in the docket. The results of this meeting were inconclusive and the Commission directed its staff, “to convene a scoping meeting to discuss the issues including, but not limited, to potential parties, discovery, timing, and coordination with other activity including FERC proceedings.” Minute entry No. 259. The staff initiated meeting was also inconclusive, but did result in an invitation to the AG to discuss his Petition directly with the Commission, and to submit a Proposed Order Initiating Investigation. The AG submitted a Proposed Order on February 3, 2004 and met with the Commission on February 4. Also, on February 2, 2004 Powerex Corporation filed a “Supplemental Pleading in Support of Dismissal from Further Commission Proceedings.”

Commission Decision

The general history of electricity market prices in the West during 2000-2001 is well known. Beginning around the latter half of 2000, and continuing through the first half of 2001, market prices for electricity rose astonishingly, relative both to where they had been during the immediately preceding period, and to the price level predictions for the 2000-2001 period.

In Montana the huge market price increases took place in the context of a major restructuring of the electricity industry and a public policy decision that all electricity customers should have the opportunity to choose their supply in a competitive market. See the Electric Utility Industry Restructuring and Customer Choice Act, §§69-8-101-503 (1997). By 2000-2001 some large business customers in Montana had taken the opportunity to go to choice, and thus were exposed to the huge market price increases during that period. This exposure caused severe economic harm to these businesses, including, in some cases, termination or suspension of operations. The harm to these large businesses obviously had a ripple effect throughout the Montana economy in the form of job losses and negative impacts on other businesses and communities generally.

While choice customers and the related economy were seriously harmed by the great electricity price spikes of 2000-2001, other customers, primarily the ordinary residential and small commercial customers of the old Montana Power Company, were not. This is because

there was a “rate moratorium” in place, meaning essentially that rates in effect on July 1, 1998 could not be increased prior to July 1, 2002. §69-8-211, MCA.

Almost simultaneously with the first electricity price spikes in the western markets, there were allegations that the price increases were in large part caused by unlawful gaming and manipulation by market participants, rather than by ordinary and lawful market forces. These allegations led to major and on-going investigations of the western markets by the Federal Energy Regulatory Commission, (FERC). These same allegations, suspicions and concerns, along with information gleaned from FERC investigations, or in some cases conclusions reached by FERC investigations, form the basis for the AG Petition that the Commission open a Montana focused investigation of energy markets during the relevant period.

The Commission finds that the AG Petition provides sufficient cause to open a limited Commission investigation into Montana electricity markets, as described below. This investigation is intended to complement ongoing work by the Commission, the Montana Consumer Counsel and the Attorney General. This work includes participation in various FERC proceedings, judicial proceedings, and work on the development of regional entities including Regional Transmission Organizations and market monitors.

Conclusions of Law

1. The Public Service Commission has jurisdiction over electricity suppliers, particularly as set forth at §§69-8-403, 404, 408, MCA.
2. The Public Service Commission has jurisdiction over NorthWestern Energy as a public utility, distribution services provider and default supplier. §§69-3-101, 102, and 69-8-210, MCA.
3. The Public Service Commission has the authority to inquire into the management and business of public utilities. §69-3-106, MCA.
4. The Public Service Commission has the authority to inquire into the business of Montana licensed electricity suppliers pursuant to §§69-8-403, 404, and 408 MCA, and ARM 38.5.8001-05.
5. The Public Service Commission has the responsibility to inquire into electricity transactions that affect the Montana retail market.
6. The Public Service Commission has the statutory authority to monitor and enforce competitive retail electricity markets, and, when necessary, to investigate and take action against

persons who commit anticompetitive, abusive and deceptive market practices. §§69-8-102, 403, 408, MCA.

Order

The Commission hereby opens an investigation of the Montana retail electricity market for the purpose of determining whether there is evidence of unlawful manipulation of that market.

This investigation is limited to the Montana retail electricity market affected by transactions involving the western electricity grid.

The motion of Energy West Incorporated to file comments out of time in Docket No. D2003.7.87 is granted.

The request of Powerex to be dismissed as a potential subject of or source of information for the investigation is denied. Any other similar requests to be dismissed are also denied. These denials do not reflect any conclusions or presumptions of the Commission regarding the role of Powerex or any other entity in Montana retail markets; or regarding the legal status of any entity as it may relate to this investigation.

As a Petitioner the Attorney General is granted intervention and has party status in the docket, subject as usual to a standing determination, if standing is challenged. The Commission will issue a Notice of this proceeding and provide an opportunity to intervene within 10 days of the service date of this Order.

The Commission staff, pursuant to delegated authority, is directed to issue a procedural order and schedule implementing this Order, within 15 days of the service date of the Order. The procedural order will provide an opportunity for discovery on Montana public utilities, licensed electricity suppliers and other entities that may possess relevant information and are subject to the investigative authority of the Commission.

The Commission will make such further orders as are necessary throughout the course of this docket.

Docket No. D2003.7.87 is closed.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Chairman

THOMAS J. SCHNEIDER, Vice Chairman

MATT BRAINARD, Commissioner

GREG JERGESON, Commissioner

JAY STOVALL, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

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