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

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| |) | REGULATORY DIVISION |
| IN THE MATTER OF the Request of the Montana |) | |
| Public Service Commission for Havre Pipeline |) | DOCKET NO. N2014.11.92 |
| Company Service Quality Information |) | |
| |) | DOCKET NO. D2015.3.32 |

Havre Pipeline Company's Opening Post-Hearing Brief

CASE SUMMARY

A. Introduction

This case involves unusual proceedings instituted by the Montana Public Service Commission ("PSC" or "Commission") with respect to farm tap service from gas gathering lines owned by the Havre Pipeline Company ("HPC"). The two consolidated dockets, PSC Docket Nos. N2014.11.92 and D2015.3.32, were instituted, *sua sponte*, by the Commission. Although the Commission has characterized the proceedings as involving complaints from HPC customers about farm tap service, no customer complaint has been referred by the Commission to HPC for answer as required by the Commission's own administrative rules. ARM 38.2.2101 *et seq.*

When the public hearing was held in this case in Havre, Montana, on October 26, 2015, no HPC customer appeared and complained about any aspect of their service from HPC.

PSC Docket No. N2014.11.92 was instituted on November 14, 2014, by Notice of Commission Action (“NCA”). The NCA required HPC “to file a plan within 20 days of the issuance of this notice to explain what it will do to meet its obligations as a public utility to provide reliable natural gas service.” NCA, ¶ 2 on page 2.

HPC prepared and filed a Response with the Commission in accordance with the NCA. Its Response provided a detailed history of the farm taps on both HPC’s gas gathering lines and its transmission line; an inventory of the farm taps, including associated gathering line pressures; a description of how the gathering system works, and the nature of the natural gas flowing through it; a description of the improvements to the gathering system since NorthWestern Energy became the manager of HPC; and a description of the options available to farm tap customers on gas gathering lines when there no longer are sufficient natural gas volumes being produced upstream of the farm taps.

The Commission’s response to NorthWestern’s filing was to create a new contested docket, PSC Docket No. D2015.3.32, and invite intervention. The Montana Consumer Counsel (“MCC”) intervened and was requested by the Commission to file supporting testimony. Procedural Order No. 7413, PSC Docket No. D2015.3.32. The matter proceeded to a contested case hearing, at which not one single HPC customer appeared to complain about their service.

B. Witnesses

The MCC presented the testimony of one witness, Mr. George Donkin. Mr. Donkin, an economist, proposed establishing a process under which HPC either had to build natural gas distribution mains to farm tap customers on HPC’s gas gathering lines, or negotiate financial packages with the customers as part of an agreement to end their farm tap service.

HPC presented the testimony of two witnesses, Mr. Marc Mallowney and Mr. John Alke. Mr. Mallowney, an engineer, presented an inventory of the farm tap customers, including those on gas gathering lines, and explained how they were receiving natural gas under bilaterally negotiated right-of-way agreements in which a farm tap was partial compensation for granting pipeline right of way. Mr. Alke, an attorney, explained the regulatory history of the gas gathering lines owned by HPC and explained why they were not PSC jurisdictional facilities. He showed how Mr. Donkin's proposal to the Commission was unreasonable and could not be implemented within the limited jurisdiction and powers of the Commission.

ISSUE

The controlling issue in this docket is whether the Commission has the power and authority to modify the terms of right-of-way agreements for gas gathering lines over which the Commission has no regulatory jurisdiction. The answer is clearly "no."

FACTS

The Havre Pipeline was once part of Northern Natural Gas Company ("Northern Natural"), an interstate natural gas pipeline company subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Northern Natural's presence in Montana was never intended as a profession of public utility service to the residents of this state. Ex. HPC-2 at 5-6. The farm taps at issue in this case are connected to natural gas gathering lines constructed by Northern Natural more than 30 years ago. Northern Natural was, and still is, an interstate gas transmission pipeline company, and in that era, interstate gas transmission pipelines acquired natural gas in the field and transported it to downstream delivery points where it was sold at wholesale to gas distribution utilities. *Id.* Northern Natural secured a significant supply of low-cost natural gas in the Tiger Ridge and Bullhook fields, which it needed to transport north into

Canada for delivery by Canadian pipeline to an interconnection with Northern Natural in Minnesota. *Id.* What is now the Havre Pipeline was constructed by Northern Natural to get its natural gas from the gas fields to the Canadian border for ultimate resale in the Midwest. *Id.*

FERC Order 636 transformed the interstate gas pipeline industry. Interstate pipelines like Northern Natural were effectively limited to being common carrier pipelines and prohibited from directly participating in the gas supply function. *Id.* Since what is now the Havre Pipeline was built to provide gas supply to Northern Natural, it was put on the market as part of an exit strategy. *Id.* HPC was created as a vehicle through which Northern Natural could sell its facilities in Montana to the natural gas producers which needed it to get their gas to market. HPC was not created to function as a natural gas distribution utility and has never functioned as one. *Id.*

When the gathering lines were owned by Northern Natural, they were FERC jurisdictional facilities. Because Northern Natural's Montana facilities were FERC jurisdictional, it had to obtain the approval of FERC to abandon interstate pipeline service in Montana in order to sell them to HPC. Ex. HPC-2 at 8-9. In that proceeding, a declaration was also sought that the facilities upstream of the three main compressors were gathering lines, a determination which would place them outside the scope of public utility regulation. *Id.* The three compressors were Blaine County #1 & #3, and Hill County #1. Tr. 70. FERC granted the requested abandonment and declaration. Ex. HPC-2, internal Exhibit__(JLA-2). The Commission similarly ruled that the gathering facilities of what would be HPC were unregulated facilities, beyond the jurisdiction of the Commission. Ex. HPC-2, internal Exhibit__(JLA-3).

HPC's farm tap customers are landowners who bargained for and received the right to tap the HPC transmission line, or its gas gathering lines, in exchange for granting right of way for

those lines. Ex. HPC-3 at 4. With the exception of an HPC employee who received farm tap service, every farm tap customer takes natural gas through a farm tap under the provisions of a written right-of-way agreement which was needed for purposes of constructing the lines. Ex. HPC-3 at 6, internal Exhibit__(MTM-1).

Every landowner with a farm tap on an HPC gas gathering line is receiving the natural gas under a right-of-way agreement, filed with the clerk and recorder of the appropriate county that expressly recognizes the intermittency of, and lack of quality in, the gas being provided under the instrument:

[S]ubject, however, to Grantee's [Northern Natural/HPC] right, without further obligation, to abandon or interrupt its use of any such line, or to transport through the same, substances which are not suitable for use by Grantor [landowner];

Ex. HPC-2, internal Exhibit_(JLA-1) page 9 of 10, ¶ 7.

When the gas fields providing natural gas to Northern Natural were initially developed, there were more than 140 farm tap customers on its transmission and gathering lines. Ex. HPC-2 at 15-16. As the fields have declined over time, and wells taken out of production, more than 40 farm tap customers stopped taking natural gas through their farm taps and converted to other energy sources. When HPC prefiled its rebuttal testimony in this case, there were 94 farm tap customers. Ex. HPC-3 at 6; Ex. HPC-2 at 15-16.

ARGUMENT

I. The Commission has no jurisdiction over the gas gathering lines owned by the HPC.

The Commission does not have jurisdiction over the gas gathering lines owned by HPC. The production and gathering of natural gas in the field is not a public utility function. The production of natural gas is not regulated by the Commission; it occurs under the regulatory oversight of the Montana Board of Oil and Gas Conservation. §§ 82-11-101, MCA *et seq.* In

fact, to eliminate any possibility of the Commission claiming jurisdiction over the production of natural gas, the Montana Legislature expressly stated: “Nothing in this chapter shall in any manner be construed as constituting or attempting to constitute oil or gas wells as a public utility.” § 82-11-102, MCA.

Since its inception, there has been a generally recognized segmentation of the natural gas industry into three functions: production, transmission, and distribution. Gathering has historically been treated as part of the production function. When Congress decided in 1938 to regulate natural gas companies doing business in interstate commerce, the Natural Gas Act lumped the production and gathering of gas together as being excluded from the scope of federal regulation. 15 U.S.C. § 717(b). Similarly, in 1997, when the Montana Legislature decided to allow the restructuring of vertically integrated intrastate natural gas utilities, it treated gathering facilities as part of the production function and isolated them from the transmission, storage, and distribution of natural gas. § 69-3-1404(1)(a), MCA.

Although the Commission, in 1984, asserted ratemaking authority over the sale of natural gas through what are now HPC farm taps, it has never had authority over the HPC gathering lines. When the Commission asserted its ratemaking authority in 1984, what is now HPC was part of Northern Natural, an interstate transmission pipeline company. Ex. HPC-2 at 12. At the time, the gathering lines were certificated facilities under the exclusive jurisdiction of FERC. When Northern Natural exited the gas supply business in response to FERC Order 636, it sold its Montana facilities to HPC, an entity created for the express purpose of accepting ownership of what were previously FERC-certificated facilities for the gas producers who needed them to get their gas to market. *Id* at 6. As a prelude to that transaction, the Commission expressly declared

it had no jurisdiction over what would be HPC's gas gathering facilities. *Id.*, at 9 (citing Declaratory Ruling in PSC Docket No. 95.2.5 issued on August 15, 1995).

The Commission's 1995 Declaratory Ruling was in no way unique to HPC. Because gas gathering is associated with the production function, the Commission has never regulated gas gathering, as it recognized in one of its decisions in a Montana Power Company case:

The PSC now determines that it has no jurisdiction over natural gas gathering, it has not directly regulated gathering even though gathering assets have been in utility rate base, and the PSC's ability to regulate gathering in some indirect way, if any, is further diminished through restructuring's removal of gathering assets from that rate base..."

Order No. 5898d, ¶ 26, PSC Docket No. 96.2.22.

The Commission has never had jurisdiction over HPC's gas gathering lines.

II. HPC has not professed to provide natural gas utility distribution service.

The hallmark of public utility service is a profession to serve the public:

[T]he most important test used in determining whether such an organization or group is in fact a public utility in this respect is the factor of serving or willingness to serve the entire public within the area in which the facilities of the organization are located.

Lockwood Water Users Ass'n v. Anderson, 168 Mont. 303, 309, 542 P.2d 1217, 1220 (1975)

(quoting 64 AmJur.2d, *Public Utilities* § 5, p. 553). Moreover, a public utility is entitled to limit the area in which it does profess to serve the public:

Territorial limit of services supplied is everywhere found. It is not to be denied that a privately owned utility may limit the territory it professes to serve.

Crawford v. City of Billings, 130 Mont. 158, 163, 297 P.2d 292, 295 (1956) (citing 73 C.J.S.,

Public Utilities § 7, p. 998).

HPC has not professed to provide natural gas distribution service to anyone in the State of Montana. Ex. HPC-2 at 5-7, 11. No one in the State of Montana has a right to receive natural

gas from HPC for end use consumption because of their proximity to HPC facilities, whether those facilities are HPC's gas gathering lines or its transmission pipeline. Only landowners who bargained for a farm tap as a condition of providing pipeline right of way are receiving gas from HPC for end use consumption.¹ *Id.* Moreover, in the case of farm taps on HPC gas gathering lines, the natural gas which is taken from the farm taps is raw untreated gas, frequently at low pressure. Tr. 63-64.

Every landowner with a farm tap on an HPC gas gathering line is receiving the gas under a right-of-way agreement,² filed with the clerk and recorder of the appropriate county that expressly recognizes the intermittency of, and lack of quality in, the gas being provided under the agreement.³

Natural gas utility distribution service requires gas distribution mains, of which HPC has none. Ex. HPC-3 at 4; *see also* Ex. HPC-2 at 13. The natural gas flows on the HPC gathering lines are in the exact opposite direction of the gas flows on a gas utility distribution system. Tr. 63-64. Natural gas utility distribution service contemplates the distribution of pipeline quality gas outward from a central source of supply, such as a high pressure natural gas transmission line. *Id.* HPC's gathering lines are moving raw untreated gas from individual wells to centralized downstream locations where the natural gas will be treated to pipeline quality and injected into a high pressure gas transmission pipeline.

It cannot be argued, in good faith, that either Northern Natural or HPC professed to provide natural gas utility distribution service in the State of Montana.

¹ HPC has determined that a former employee was allowed to connect to an existing farm tap. Ex. HPC-3 at 6. In that instance, access to the farm tap was an employment benefit.

² See footnote 1, *supra*.

³ The farm tap agreements executed after the gas gathering lines were constructed describe the intermittency of the gas being provided in greater detail. Ex. HPC-2. Internal Exhibit_(JLA-1), p. 3 of 10, ¶ 4.

III. The Commission does not have the power or authority to modify the right-of-way agreements under which the HPC's gas gathering lines were constructed.

It is beyond cavil that the right-of-way agreements under which farm tap customers obtain access to raw untreated gas from HPC's gas gathering lines are legally enforceable agreements, binding upon landowner and HPC alike. They create a pipeline easement, as well as a transferable right to take raw untreated gas from the gathering lines (subject to condition, including availability). The agreements expressly recognize the intermittency of, and lack of quality in, the natural gas stream being accessed through the farm tap. Ex. HPC-2, internal Exhibit__(JLA-1), page 9 of 10.

The Commission regulates public utility service under Chapter 3 of Title 69 of the Montana Code Annotated. It does not regulate right-of-way agreements between landowners and pipelines. It does not have the power to modify property interests or documents conveying interests in real property. To suggest that it does flies in the face of the overarching prohibition against the Commission claiming judicial powers set forth in its own enabling legislation. § 69-3-103(1), MCA.

Nor does the Commission have the power to change the agreed-upon compensation for pipeline right of way. The Commission does not have the power to order additional compensation to the landowners for the right of way they provided in the form of a Commission-imposed requirement to provide natural gas utility distribution service. The Commission is an administrative agency, with only the limited powers granted by the Montana Legislature:

The commission is a mere administrative agency, created to carry into effect the legislative will. It has only limited powers, to be ascertained by reference to the statute creating it, and any reasonable doubt as to the grant of a particular power will be resolved against the existence of the power.

State ex rel Thatcher v. Boyle et al, 62 Mont. 97, 102, 204 P. 378, 379 (1921); *in accord*; *Great Northern Utilities Co. v. Public Service Commission*, 88 Mont. 180, 203, 293 P. 294, 298 (1930); *City of Polson v. Public Service Commission*, 155 Mont. 464, 469, 473 P.2d 508, 511 (1970); *Montana Power v. Public Service Commission*, 206 Mont 359, 671 P.2d. 604 (1983).

In this case, the lack of power is not a close question. No provision of Chapter 3 of Title 69 empowers the Commission to modify right-of-way agreements for gas gathering lines negotiated by a FERC-regulated interstate pipeline company. The Commission does not have the power or legal authority to direct HPC to provide gas utility distribution service to farm tap customers on HPC gathering lines, instead of providing the intermittent stream of raw untreated gas which the landowners wanted, and bargained for, as a condition of granting pipeline right of way.

IV. The Commission does not have the power or authority to implement the recommendations of the MCC in this docket.

The position of the MCC is contained in the testimony of its witness, Mr. George Donkin. In its simplest form, Mr. Donkin's proposal is as follows:

- (1) HPC must negotiate a financial package with the farm tap customers for the right to stop providing gas through the farm taps on the gathering lines. Ex. MCC-1 at 12-13.
- (2) If HPC and the farm tap customers settle upon a financial package, the HPC can apply to the Commission for approval of the settlement and authority to abandon the gas gathering lines. *Id* at 12.
- (3) If HPC fails to meet the financial demands of the farm tap customers, or the Commission refuses to approve an agreed-upon financial settlement, the HPC must build gas distribution mains to serve them. *Id* at 13-14.

According to Mr. Donkin, the Commission's adoption of his plan will result in HPC buying out the remaining farm tap customers at their cost of converting to another fuel source and converting their appliances to that fuel source. Ex. MCC-1 at 12-13.

There are multiple flaws in the MCC analysis and recommendation:

- (1) HPC does not need to negotiate with the farm tap owners for the right to abandon use of the gathering lines. It already has that right under the right-of-way agreements.
- (2) The Commission does not have regulatory jurisdiction over HPC's gas gathering lines. HPC does not need the approval of the PSC to stop using a gas gathering line when there is no longer upstream production. Neither the Commission nor HPC can force a gas producer to fill a gathering line with gas.
- (3) Mr. Donkin's three-part proposal will not result in a financial arrangement for the farm tap customers at the estimated cost of converting them to an alternate fuel source and converting their appliances to that fuel source, as he contends. His plan would drive the cost of any financial settlement between the farm tap customers and HPC to a much higher cost. Ex. HPC-2 at 18-19. Under Mr. Donkin's plan, the farm tap customers would know that their refusal to settle with HPC would expose it to potentially millions of dollars in construction costs. *Id.* They would use that leverage to capture, in settlement negotiations, a significant portion of what they estimated would be HPC's cost to build gas distribution mains to them. *Id.*
- (4) Mr. Donkin's three-part plan is intended to mimic a class action settlement in a district court action. *Id.* at 19. The Commission is statutorily prohibited from trying to exercise judicial powers. § 69-3-103(1), MCA. It has no authority to award damages, such as the landowners' cost of converting to another energy source.

(5) The Commission does not have the power to impose costs upon HPC and declare them unrecoverable in its cost of service, as proposed by Mr. Donkin. Ex. MCC-1 at 13. If the Commission was to attempt to make HPC pay the cost of converting the landowners to another energy source, it would be compelled by the due process provisions in both the federal and Montana constitutions to reflect such costs in HPC's cost of service. Ex. HPC-2 at 19-20.

V. **The Commission should implement in this docket the recommendations of HPC.**

The provisioning of natural gas utility distribution service to farm tap customers on HPC gathering lines was neither bargained for, nor contemplated, in the right-of-way agreements between the landowners and Northern Natural. It would also be grossly uneconomic to provide such service. Ex. HPC-2 at 14-15. Given the written right-of-way agreements, no landowner could have a reasonable expectation of receiving natural gas utility distribution service from HPC. As indicated by NorthWestern witness Alke, it would be a disservice for the Commission to lead the landowners to believe that natural gas utility distribution service is going to be extended to them, without cost, and without regard to economic reality. Ex. NWE-2 at 20.

The Commission's final order in this docket should follow the recommendations of Mr. Alke and indicate as follows:

- (1) The Commission does not have regulatory jurisdiction over gas gathering lines;
- (2) The Commission's jurisdiction over retail sales through a farm tap on an HPC-owned gas gathering line is limited to determining a reasonable rate to be paid for the gas;
- (3) HPC has not professed to provide natural gas utility distribution service and has no gas distribution mains;

- (4) It would not be economical to construct natural gas distribution mains to serve 94 farm tap customers spread across a wide geographic area;
- (5) When there is insufficient gas being gathered through a gathering line to safely provide farm tap service, HPC is entitled to abandon its use of the gathering line, and the farm tap customer will have to choose and make arrangements for another fuel source;
- (6) HPC is obligated to reasonably maintain the meter and regulator, pressure relief valve, odorizer, and, if applicable, desiccant pot used to provide farm tap service on a gathering line until the use of the gathering line is abandoned; and;
- (7) HPC will give affected farm tap customers at least twelve months' notice of an intent to abandon use of a gas gathering line in order to provide the farm tap customer adequate time to choose and make arrangements for another fuel source.

Ex. HPC-2 at 20-21.

CONCLUSION

There is no problem which needs fixing in this docket. The landowners who entered into right-of-way agreements with Northern Natural neither bargained for, nor expected to receive, natural gas utility distribution service from Northern Natural or HPC. Not one single landowner with a farm tap on an HPC gas gathering line appeared and testified that they should receive natural gas distribution utility service instead of the intermittent stream of raw untreated gas specified in the right-of-way agreements into which they voluntarily entered. Nor did one single landowner appear and testify at the public hearing in this case that they should receive compensation from HPC when there is no longer sufficient gas in the gathering lines to provide raw untreated gas to them.

The Commission must recognize, again, that it does not have jurisdiction over gas gathering lines. It also needs to recognize that it does not have the power or authority to modify right-of-way agreements for gas gathering lines. There is no discernible reason for the Commission to try and stretch the limits of its jurisdiction based on the facts of this case.

The Commission must reject the recommendation of the MCC in this case. It has no support in Montana law. The Commission should issue an order which indicates it has no jurisdiction over HPC's gas gathering lines and states that it lacks the power and authority to modify the terms of the pipeline right-of-way agreements.

Respectfully submitted this 9th day of December 2015.

Havre Pipeline Company

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Havre Pipeline Company's Opening Post-Hearing Brief in Docket Nos. D2015.3.32/N2014.11.92 has been hand delivered to the Montana Public Service Commission and Montana Consumer Counsel, e-filed with the Montana Public Service Commission, and emailed to counsel of record this date. It has also been served upon the remainder of the service list by postage prepaid via first class mail as follows:

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DATED this 9th day of December 2015.



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