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

)	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 Post-Hearing Response Brief

INTRODUCTION

Pursuant to the schedule agreed to by the parties, Havre Pipeline Company, LLC ("HPC") and the Montana Consumer Counsel ("MCC") filed simultaneous Opening Briefs on December 9, 2015. HPC submits this brief in response to the MCC's Opening Brief.

ARGUMENT

I. The MCC refuses to acknowledge that the Montana Public Service Commission does not have jurisdiction over HPC's natural gas gathering lines.

Not once in the entirety of its Opening Brief does the MCC acknowledge that the Montana Public Service Commission ("Commission") does not have jurisdiction over HPC's natural gas gathering lines. It states at page 3 of its Opening Brief that the Commission's August 15, 1995, Declaratory Ruling indicates that farm tap service is subject to the Commission's ratemaking authority. It neglects to state that the very same ruling specifically recognized that the Commission does not have jurisdiction over the HPC gathering lines. The MCC even boldly

declares in its Opening Brief that jurisdiction is not an issue in this case. MCC Opening Brief at 4.

Contrary to the MCC's bold assertion, the Commission's lack of jurisdiction over the HPC gathering lines is the controlling issue in this case. The nature of the service received by the farm tap customers on HPC's natural gas gathering lines is not defined by the rate for farm tap service set by the Commission. It is defined by the nature of the gathering lines being used to provide farm tap service, the quality of the natural gas stream in those gathering lines, and the written agreements which reflected the nature of the gathering lines and natural gas stream.

The farm tap customers on the HPC natural gas gathering lines are not receiving natural gas utility distribution service from natural gas distribution mains. Ex. HPC-2 at 13. They have never received such service, as HPC does not have any natural gas distribution mains. *Id.* The farm tap customers on HPC's natural gas gathering lines are receiving raw untreated gas from gathering lines connected directly to individual gas wells. What was bargained for and is being received by the farm tap customers on natural gas gathering lines is an intermittent stream of raw untreated gas which does not meet pipeline quality standards. It can never meet pipeline quality standards because removing water and impurities from the natural gas stream occurs downstream of the farm taps.

The MCC is attempting to bootstrap the Commission's authority over the rate for farm tap service into authority over natural gas gathering lines, and the quality of the natural gas stream in those gathering lines. Northern Natural Gas Company ("Northern Natural") did not contest the Commission's assertion of ratemaking authority over farm tap service in 1984. The agreements between Northern Natural and the landowners were crafted to recognize the possibility of the Commission asserting its ratemaking jurisdiction over the transaction. *See Ex.*

HPC-2, internal Exhibit__(JLA-1), p. 9 of 10. However, the Commission’s authority to regulate price was (and still is) much different than its authority to regulate either the facilities owned by Northern Natural, or the nature of the services Northern Natural provided with its facilities. Northern Natural was a Federal Energy Regulatory Commission (“FERC”) jurisdictional interstate pipeline company, and its facilities were FERC certificated facilities. While the rate for a sale of natural gas to an end use customer in the State of Montana was subject to the jurisdiction of the Commission, Northern Natural’s operations in Montana, including the services it provided, were not the subject of Commission jurisdiction.

The Commission itself has recognized the difference between jurisdiction to set the rate for farm tap service, and jurisdiction over the facilities being used to provide farm tap service. The Commission expressly disclaimed jurisdiction over HPC’s gathering lines in 1995, eleven years after it asserted ratemaking authority over farm tap service in 1984. *See* Declaratory Ruling in Docket No. 95.2.5 issued on August 15, 1995. The Commission’s own regulatory actions reflect the obvious distinction between authority over rates and authority over facilities.

The MCC seems to suggest that HPC somehow conceded jurisdiction after the Commission instituted these dockets. MCC Opening Brief at 2 and 4. Its assertions are puzzling at best. The Commission’s jurisdiction is purely statutory. *Montana Power Company v. Public Service Commission*, 206 Mont. 359, 371, 671 P.2d 604, 611 (1983) (*citing 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); *State ex rel. Thatcher v. Boyle*, 62 Mont. 97, 102, 204 P. 378, 379 (1921). Jurisdiction cannot be conferred upon an administrative agency by consent. *Montana Board of Natural Resources and Conservation v. Montana Power Co.*, 166 Mont. 522, 529, 536 P.2d. 758, 762 (1975).

The Commission's Notices of Commission Action are not orders of the Commission, issued after notice and hearing. They are, on their face, simply notices, issued *sua sponte* by the Commission. HPC's first opportunity to challenge the Commission's jurisdiction in these dockets was through the pre-filing of the testimony of its expert witness, Mr. Alke. The MCC cannot seriously contend that Mr. Alke did not clearly and unequivocally assert that the Commission lacked jurisdiction to implement the proposal of MCC's witness, Mr. Donkin. The entirety of Mr. Alke's testimony, twenty-one pages and exhibits, were devoted to that subject.

II. The authorities cited by the MCC have no application to this case.

The MCC cites three cases in support of its position in this case. MCC Opening Brief at 6-8. Not one of the three cases has any application to the facts of this case.

The MCC first cites *Williamson v. Montana Public Service Commission*, 2012 MT 32, 364 Mont. 128, 272 P.3d 71, for the proposition that HPC cannot rely upon the agreements with the landowners to define the scope of its obligations to them. The holding in the *Williamson* case was that property taxpayers in municipal lighting districts have standing to file a complaint with the Commission over the rates charged for street light service. *Id.* at ¶s 47-48. The case had nothing to do with Commission jurisdiction over natural gas gathering lines or right-of-way agreements.

The MCC next cites *Application for Approval of Abandonment of Service by Columbia Gas of Pennsylvania, Inc.*, Order of Pennsylvania Public Utility Commission ("PPUC Order"), Docket Number A-2011-2250138. In that case, Columbia Gas of Pennsylvania, Inc. ("Columbia") was providing natural gas distribution service to 414,000 customers in the state. PPUC Order, p. 2. Its upstream interstate pipeline supplier, Columbia Gas Transmission, filed for and received authority from the FERC to sell a segment of its interstate pipeline to another

company which intended to convert the pipeline segment from a gas transmission line to a natural gas gathering line. *Id.*, pp. 2-3. Columbia sought certificate authority to abandon its gas distribution utility service to eight customers whose pipeline quality gas supply came from the pipeline segment being sold. *Id.*, p. 3. To obtain their consent in the certificate proceeding, Columbia entered into agreements to pay for their customers costs of converting to another fuel source. *Id.*, p. 4.

The farm tap customers in these proceedings were never natural gas distribution service customers receiving pipeline quality gas from HPC. Ex. HPC-2 at 13. Moreover, Columbia was a natural gas distribution utility serving 414,000 customers under a commission issued certificate of public convenience and necessity. HPC has no certificate of authority specifying an obligation to serve as a natural gas distribution utility, and has never professed to provide natural gas distribution utility service to anyone in the State of Montana.

It is odd that the MCC would cite the *Columbia* case as authority to support its advocacy that HPC must negotiate financial settlements with the farm tap customers to stop providing an intermittent natural gas stream of raw untreated gas to them, and then to bear the burden of the settlement costs. In the *Columbia* case, the Pennsylvania Public Utility Commission scolded Columbia for entering into such settlements:

[W]e are troubled by Columbia's decision to consummate these agreements and pay compensation to the affected customers before receiving our authority to do so. In addressing any request by a utility to abandon service to its customers, we consider all specific terms of such abandonment—including any compensation to be paid to the customers by the utility—to be within the scope of our review. Such terms may affect not only the customers whose service is to be abandoned, but the remaining ratepayers on the utility's system as well.

PPUC Order, p. 7 (emphasis supplied).

Conspicuously lacking from the MCC's brief is any demonstration that the Montana

Commission has the same authority under Montana law that the Pennsylvania Commission has under Pennsylvania law. As the *Columbia* case makes abundantly clear, Pennsylvania regulates the facilities of its jurisdictional utilities through a certificate system. Montana does not.

The last case cited by the MCC is *Southern California Gas Company's Request for Authorization to Abandon a Pipeline and Service to Two Residential Customers*, Resolution G-2941 (1991). In that case, Southern California Gas Company ("SoCal Gas"), a natural gas distribution utility, sought Commission authority to abandon 3.24 miles of its gas distribution main, and service to two customers served by the main. Resolution, p. 1. Again, to secure the consent of the customers, the utility agreed to compensate them not only for their cost of converting to propane, but to pay for their propane for two and half years. *Id.*

The Commission can take judicial notice of the fact the SoCal Gas is a major natural gas distribution utility in the State of California providing natural gas distribution service to many thousands of customers in the state. Clearly, it had professed to provide natural gas utility distribution service in the state, and the gas distribution main it was seeking to abandon was a jurisdictional facility. In these proceedings, the Commission has specifically disclaimed jurisdiction over the HPC natural gas gathering lines, and neither HPC nor Northern Natural ever professed to provide natural gas utility distribution service in the State of Montana.

There is an interesting sidelight to the *Southern California Gas Company* case ignored by the MCC. The California Commission's Division of Ratepayer Advocates, the equivalent of the MCC in the State of California, opposed SoCal Gas' request because of the bad precedent it would set. *Id.*, p. 2.

III. The Right-of-Way Agreements define HPC's obligations to its farm tap customers on its natural gas gathering lines.

The right-of-way agreements negotiated by Northern Natural with the landowners

providing pipeline right of way define the rights of both HPC and the landowners. The landowners entering into the agreements knew they were not being offered natural gas distribution service as compensation for the right of way needed to construct the natural gas gathering lines. The right-of-way agreements clearly and unequivocally specified that the agreed upon natural gas stream, provided as partial compensation for pipeline right of way, would be intermittent, and not of pipeline quality:

[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.

The MCC's Opening Brief refuses to acknowledge the existence of the underlying right-of-way agreements. Instead, it inaccurately portrays what it calls the "genesis of the service issue." MCC Opening Brief at 3. According to the MCC, the "genesis" is the applications for farm tap service submitted after the right-of-way agreements were negotiated and executed, and after the gathering lines were built in reliance on those agreements. *Id.* It then describes the provision in the application for farm tap service reserving Northern Natural's right to abandon the gathering lines as an "isolated clause." MCC Opening Brief at 6.

What the MCC is trying to obfuscate is that the gathering lines would not have been built in the absence of the pipeline right-of-way agreements, and no rational human being would agree to provide natural gas distribution service out of a natural gas gathering line. Every landowner granting a pipeline right of way for a natural gas gathering line knew that the natural gas stream they would be provided through the farm tap would not be pipeline quality, and that the natural gas stream they would receive would be both intermittent and temporary. That was an essential and critical part of the pipeline right-of-way agreements for gathering lines, not an "isolated

clause.”

The MCC attempts to further obfuscate the issues in this case by contending the Commission cannot decide in this case whether to allow HPC to cease providing farm tap service on a gathering line because HPC has not filed for permission to abandon any of its gathering lines. MCC Opening Brief at 6. HPC does not need to seek the approval of the Commission to take a gathering line out of service. Its gathering lines are not Commission jurisdictional facilities. Even if they were, Montana does not have a certificate system governing utility facilities. Abandonment proceedings are associated with regulatory regimes governed by certificates of public convenience and necessity.

Montana utilizes a certificate system and requires Commission approval for abandonment of motor carriers. § 69-12-403, MCA. The Montana Legislature clearly understands how to create such a regulatory regime and declined to establish one for public utilities under the Commission’s jurisdiction.

CONCLUSION

The Commission does not have the jurisdiction or authority to implement the recommendations of the MCC witness Mr. Donkin in this docket. The Commission does not have jurisdiction over HPC’s natural gas gathering lines and the right-of-way agreements under which the pipelines were constructed. The Commission should issue an order in this docket which indicates that it lacks the power and authority to modify the terms of pipeline right-of-way agreements, and which rejects the MCC advocacy.

Respectfully submitted this 16th 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 Post-Hearing Response 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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