

Service Date: October 28, 2004

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

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IN THE MATTER of the Application of)	UTILITY DIVISION
PacifiCorp for Approval of Its Electric Utility)	
Restructuring Transition Plan Filed Pursuant)	DOCKET NO. D97.7.91
to Senate Bill 390)	ORDER NO. 5987h

FINAL ORDER

BACKGROUND

1. In the 1997 Montana Legislative Session, the legislature passed Senate Bill 390 (SB 390) which required public utilities under the jurisdiction of the Montana Public Service Commission (Commission) to file transition plans to customer choice not later than one year before the date any customer had the right to choose its electric supplier. Large customers of PacifiCorp (PC) were entitled to choice on July 1, 1998. Consequently, the deadline for PC to file a transition plan was July 1, 1997.

2. On June 24, 1997, the Commission issued a procedural order opening the docket. On July 1, 1997, PC filed an Application for Approval of its Electric Utility Restructuring Transition Plan (Plan). Twenty-four entities, including the Montana Consumer Counsel (MCC), the Montana Department of Environmental Quality (DEQ), and Plum Creek Timber (PCT), intervened. On September 22, 1997, the Commission issued a Preliminary Determination and Order on Transition Plan that the Plan was not complete and directed PC to file a revised plan that addressed deficiencies identified in the Preliminary Determination.

3. On October 16, 1997, PC filed an Application for Approval of PacifiCorp's Revised Transition Plan (Revised Plan). There were considerable discovery requests, contested motions, and procedural amendments which delayed the proceeding.

4. On May 19, 1998, a hearing was held on the issue of large customer choice. On June 18, 1998 the Commission issued an order implanting large customer choice

effective July 1, 1998.

5. PC then disrupted the continuation of this proceeding on July 20, 1998, by issuing an RFP seeking bids for its distribution facilities and some related transmission facilities in Montana. Commission and MCC filed an action in the Eleventh Judicial District Court (Court Action) to prevent PC from selling and transferring its distribution facilities and public utility obligations in Montana until the Commission conducted proper procedures to evaluate and approve the sale.

6. On September 3, 1998, PC submitted the supplemental testimony of Anne E. Eakin. In that testimony PC asserted:

Once the sale of the distribution facilities is closed, PacifiCorp will no longer be a jurisdictional utility in the state of Montana and will no longer be subject to any ongoing restructuring proceeding. PacifiCorp will be foregoing collection of its stranded costs in Montana and would not be subject to distribution of any stranded benefits, if, contrary to the Company's position in the transition plan docket, the Commission finds that stranded benefits exist. . . . PacifiCorp maintains that the Commission does not have authority to require a utility to pay negative stranded costs. Negative stranded costs are not "transition costs" under Montana law and SB 390 does not provide for "collection" of negative costs do not get stranded in the transition to competitive markets. (PPL/Eakin at 5-6.)

7. On September 21 and 22, 1998, hearings were held on PC's Revised Plan. On October 8, 1998, the parties in the Court Action finalized a Settlement Agreement to stay the preliminary injunction proceeding. PC agreed to remain in this docket but reserved jurisdictional arguments. PC filed its Initial Brief (PC Br.) on October 22, 1998. PC asserted "SB 390 does not contemplate the existence of, nor does it define or authorize collection of, stranded benefits." PC Br. at 34. PC also asserted "ordering stranded benefits to be distributed to rate payers would be beyond the Commission's jurisdiction and would be an unconstitutional taking." PC Br. at 38.

8. On November 2, 1998, the Commission issued an Order Approving the Proposed Sale of PacifiCorp's Electric Distribution System to Flathead Electric Cooperative, Inc. (Flathead), which actually approved the sale to Energy Northwest Incorporated (ENI), a regulated subsidiary of Flathead; the sale closed on November 5, 1998.

9. MCC and PCT filed response briefs on November 19, 1998. MCC asserted “the Commission has the authority and obligation to provide for recovery of stranded benefits.” MCC Br. at 16. PCT argued “net transition costs must be recovered by PacifiCorp if positive and by ratepayers if negative. PCT Br. at 1.

10. PC filed its Reply Brief (PC Reply Br.) on December 2, 1998. PC asserted that it was not a Montana public utility, PC Reply Br. at 4, that SB 390 did not address or authorize recovery of stranded benefits, PC Reply Br. at 41, and that ordering payment of stranded benefits would constitute a taking without just compensation, PC Reply Br. at 48.

11. No formal action approving or denying the Revised Plan was taken subsequent to the briefing.

12. After the legislature removed pertinent restrictions on service by cooperatives, ENI was merged into Flathead in 2001.

13. On August 2, 2001, the Commission issued a Notice of Opportunity to Comment on the reasonableness of reopening the administrative record in the proceeding. PC, MCC, PCT, and nine members of Flathead submitted comments. The Flathead members’ comments were on form letters.

14. On July 3, 2002, Flathead filed a Petition for Late Intervention. PC responded on July 26, 2002, opposing late intervention. Flathead replied on August 9, 2002. On December 17, 2003, the Commission issued a Notice of Commission Action denying Flathead’s Petition for Late Intervention.

DISCUSSION

15. This docket presents three legal questions: (1) Is PC a public utility subject to the jurisdiction of the Commission for purposes of the Electric Utility Industry Restructuring and Customer Choice Act, §§ 69-8-101, et seq., MCA (the Act); (2) Is the requirement in § 69-8-202(3), MCA, that the Commission shall issue a final order approving or denying a transition plan before 9 months after the date a public utility files a plan directory or jurisdictional; and (3) Did the legislature grant authority to the Commission to order that stranded benefits be distributed to ratepayers? The resolution of the third legal question is dispositive of this docket; the Commission declines to unnecessarily decide the first two questions.

16. In determining the scope of the Commission's authority, the language of the statute must be construed according to its plain meaning. If the language is clear and unambiguous, no further interpretation is allowed. *See Ravalli County v. Erickson*, 2004 MT 35, ¶¶ 11-12, 320 Mont. 31, ¶¶ 11-12, 85 P.3d 772, ¶¶ 11-12 (2004). The Commission's task is to ascertain and interpret the terms and substance of §§ 69-8-103(30), and 69-8-211, MCA. The Commission may appropriately resort to dictionaries to define the common use and meaning of terms. *See Ravalli County*, ¶ 13.

17. Section 69-8-211(1), MCA, provides in pertinent part “. . . the commission shall allow recovery of the following categories of transition costs . . . the unmitigable transition costs related to public utility-owned generation . . .” Section 69-8-211(3)(a), MCA, provides “[o]n commission approval of the amount of a public utility's transition costs, those costs must be recovered through imposition of a transition charge.” The plain, unambiguous language provides that the only method for recovery of transition costs is imposition of a transition charge.

18. Section 69-8-103(30), MCA, defines transition charge as “a nonbypassable rate or charge to be imposed on a customer to pay the customer's share of transition costs.” “Rate” means the amount of a charge or payment with reference to a basis of calculation. *Black's Law Dictionary* 1261 (6th ed. 1990). A “charge” is a burden or liability. *Black's Law Dictionary* 233 (6th ed. 1990). To “impose” is to levy or exact. *Black's Law Dictionary* 755 (6th ed. 1990). The statute requires that a transition charge be a burden or liability exacted from a customer. The plain language of the statute does not allow the Commission to exact a burden or liability from a public utility.

19. Neither MCC nor PCT asserted that the language of §§ 69-8-103(30) or 69-8-211, MCA is ambiguous or even discussed the language of § 69-8-103(30), MCA. MCC argued that nothing in SB 390 constrained transition costs to a positive liability and that the netting required by the Act necessarily contemplated the possibility of negative transition costs. MCC Br. at 16. MCC further argued that the Legislature intended a balanced approach that would protect the interests of utilities and consumers. MCC Br. at 18. Finally MCC argued that failure of customers to recover stranded benefits would violate the well established principle that customers who have borne the burden of utility operations should share in the benefits resulting therefrom. MCC Br. at 18. PCT also

focused on the definition of transition costs. PCT Br. at 1-2. PCT also argues that imposition on a public utility of a liability for stranded benefits is consistent with traditional ratemaking principles and necessary for fundamental fairness. PCT Br. at 2-3.

20. The Commission is sympathetic to the arguments asserted by MCC and PCT. The Commission consistently has sought to fairly balance the long-term interests of Montana utility companies and the customers they serve. The Commission has also consistently applied the principle that ratepayers who have borne the burden of utility operations should share in the benefits resulting therefrom. The Commission's source of authority for applying said principle is, in part, its general authority of supervision, regulation, and control of public utilities and its power to determine just and reasonable rates.

21. However, in this instance the Commission is confronted with a clash between its general authority and specific authority granted it by the Act. The general rule is that a specific statute controls over a more general statute. *See Redies v. Cosner*, 2002 MT 86, ¶ 19, 309 Mont. 315, ¶ 19, 48 P.3d 697, ¶ 19 (2002) citing *Montana Dep't of Revenue v. Kaiser Cement Corp.*, 245 Mont. 502, 506-07, 803 P.2d 1061, 1063-64 (1990). Sections 69-8-211 and 69-8-103(30), MCA are specific statutes controlling the Commission's authority with respect to transition costs and recovery thereof. In this narrow instance the Commission's general authority must give way to the specific statute enacted by the Legislature.

22. Absent any ambiguity in the statutory language, the Commission is constrained by the plain language of the Act. The Commission may not insert what has been omitted or omit what has been inserted. *See Ravalli County*, ¶ 11, § 1-2-101, MCA. The plain language of the Act authorizes the Commission to impose a liability only on the customers of a public utility. The Commission may not insert language that would allow it to impose a liability on a public utility.

23. Nothing in this order should be construed as limiting the Commission's general authority with respect to ratemaking or the supervision, regulation, and control of public utilities other than in circumstances involving the application of §§ 69-8-103(30) and 69-8-211, MCA.

CONCLUSIONS OF LAW

24. Sections 69-8-103(30) and 69-8-211, MCA, are specific statutes which control over any general statutes granting authority to the Commission.

25. Section 69-8-211(3)(a), MCA, requires the Commission to allow recovery of transition costs through the imposition of a transition charge.

26. Section 69-8-103(30), MCA, limits a transition charge to a liability imposed on customers of a public utility.

27. The Legislature did not grant the Commission authority to impose a liability on a public utility for negative transition costs.

ORDER

IT IS HEREBY ORDERED Docket 97.7.91 is closed.

Done and dated this 26th day of October, 2004 by a vote of 3 to 1. Commissioner Greg Jergeson concurred in the result only. Commissioner Bob Rowe dissented. Commissioner Thomas J. Schneider recused himself from this docket and took no part in this decision.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Chairman, dissenting

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 ARM 38.2.4806.