

Service Date: April 6, 1989

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)	TRANSPORTATION DIVISION
of the Burlington Northern Railroad)	
Company for Discontinuance of its)	DOCKET NO. T-9264
Agency Operations at Culbertson,)	
Montana.)	ORDER NO. 5929

ORDER GRANTING PETITION FOR REHEARING

BACKGROUND

On August 25, 1988 Burlington Northern Railroad Company (BNRC) filed a petition with the Montana Public Service Commission (Commission) for authority to discontinue its agency operations at Culbertson/Bainville, Montana (Culbertson). BNRC stated in its petition that the agent at Culbertson provides no service to BNRC or its customers, and that public convenience and necessity does not require the continued operation of a resident agent at that location.

Pursuant to notice, the Commission held a hearing on the petition on November 16, 1988, in Culbertson. The hearing was open to the public. Testimony was given by witnesses for BNRC, and Mr. Mular on behalf of the affected rail union. Mr. Allen Peterson, of Culbertson, also appeared and testified in opposition to the closure. Mr. Peterson is the president of the Culbertson Chamber of Commerce, and is not a shipper. No other public witnesses appeared.

On March 24, 1989 the Commission received a Petition for Rehearing or Reopening, filed by the Culbertson Chamber of Commerce (Chamber).

DISCUSSION, ANALYSIS AND FINDINGS

In its Petition, the Chamber states that its representatives and membership were discouraged from attending the public hearing in Culbertson by BNRC employees, and were informed that participation in the public hearing would be fruitless, as the depot would be closed regardless of public opposition.

The Petition also states that the Chamber, through its representatives and membership, have additional evidence and testimony that should have been presented at the public hearing, including: the reliance of area shippers upon rail service; the possible deterioration of safety standards and capabilities as a result of the proposed closure. These claims are supported by various affidavits, including those of several area shippers, and the chief of the local volunteer fire department.

The affidavits of the various shippers all have the following common themes: that they rely on BNRC rail service; that they were advised by several BNRC employees that it was useless to appear at the public hearing; that they believe that the level of rail service they are currently receiving will suffer if the closure is allowed; and, that they would have appeared at the hearing but for the intervention of the BNRC employees.

On April 4, 1989 BNRC filed its brief in opposition to the Petition for Rehearing. Briefly, BNRC argued the following: All of the shippers utilizing rail service at Culbertson were contacted in person about the hearing; adequate notice of the hearing was provided; none of the

affiants appeared at the public hearing, although they all acknowledge that they knew it was scheduled; that the state and BNRC should not be required to bear the expense associated with returning to Culbertson, just because the affiants failed to pursue their rights; the failure of petitioners to make reasonable inquiry of the Commission as to any objections they had constitutes inexcusable neglect on their part; and, that the Petition does not meet the requirements found in the Commission's rules. Finally, BNRC requests that if rehearing is granted, Petitioners be assessed with the costs incurred by both BNRC and the Commission.

While the Commission agrees with BNRC that interested parties should not "sleep in their rights," the Commission grants the petition for rehearing. The affidavits submitted by the Chamber appear to show that the affiants have been improperly discouraged from attending the hearing by BNRC employees. The Commission strongly disapproves of behavior of this type, and cannot ignore the consequences that such activities may have for the development of a complete record in these proceedings. Although the Commission is reluctant to make any findings on the basis of affidavits alone, the statements submitted herein uniformly present a situation bordering on fraud, which, compels the Commission to reopen these proceedings.

On the more technical side, the Commission disagrees with BNRC that the Petition filed herein fails to meet the requirements of ARM 38.2.4805(2), by presenting evidence of material changes in fact or law which have occurred since the conclusion of the hearing. Obviously, what has occurred since the hearing is that Petitioners now believe that they have been misled. In any event, the Commission finds that, based upon the facts presented herein, good cause exists for waiving that particular requirement.

In addition, the Commission notes that the Chamber has not sought intervention in this proceeding, and is thus not formally a party. Although ARM 38.2.4805 acknowledges petitions for rehearing filed by parties, the Commission also notes that, in its discretion, it may allow persons to appear, testify, and conduct cross-examination without formally intervening. ARM. 38.2.2401(2). Indeed, in proceedings of this nature, such participation by the interested public is the rule, rather than the exception. Again, and to the extent necessary, the Commission finds that the circumstances warrant the waiver of any such requirement.

Finally, the Commission denies BNRC's request for its costs and expenses in appearing at the rehearing in this proceeding. The Commission does not possess this power.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Montana Code Annotated, Title 69, Chapter 14.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter, pursuant to Montana Code Annotated, Title 2, Chapter 4.
3. The Petition for Rehearing or Reopening filed herein has presented sufficient grounds to warrant a rehearing in this proceeding.
4. The findings made herein are adopted as Conclusions of Law.

ORDER

Now, Therefore it is Ordered that the Petition for Rehearing or Reopening, filed by the Culbertson Chamber of Commerce, is granted.

It is Further Ordered that this matter shall be set for rehearing as soon as possible, consistent with the Commission's other responsibilities.

Done and Dated this 6th day of April, 1989 by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

HOWARD L. ELLIS, Vice Chairman

WALLACE W. "WALLY" MERCER, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

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