

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

IN THE MATTER OF the Application) REGULATORY DIVISION
of Devon Gas Corporation and Havre)
Pipeline Company, LLC for) DOCKET NO. D2013.7.57
Declaratory Ruling or for Approval of)
the Proposed Sale of Ownership) ORDER NO. 7307a
Interests)

ORDER ON PETITION FOR DECLARATORY RULING

1. On July 30, 2013, Devon Gas Corporation (Devon) filed an Application for Declaratory Ruling or for Approval of the Proposed Sale of Ownership Interests in Havre Pipeline Company, LLC (Application).

2. Montana Code Annotated § 2-4-501 states: "Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." The Public Service Commission (Commission) has adopted Admin. R. Mont. 38.2.101, which adopts the Attorney General's Model Procedural Rules. Rules 1.3.226-1.3.229 of the Administrative Rules of Montana govern the Commission's consideration of and action on requests for declaratory rulings.

3. On August 6, 2013, the Commission issued a Notice of Application and Opportunity to Comment and Intervene. On August 19, 2013, NorthWestern Energy (NorthWestern) filed a Petition for Intervention. On August 20, 2013, the Montana Consumer Counsel (MCC) filed a Petition for Intervention. On August 21, 2013, the Commission issued a Notice of Staff Action Granting Intervention for both parties. On September 26, 2013, the MCC filed Comments on the Application for Declaratory Ruling and Motion to Accept Filing. The MCC moved the Commission to accept the filing stating MCC's opposition to the granting of the declaratory ruling that Devon and Havre Pipeline Company, LLC (Havre Pipeline) seek. The MCC asks that the Commission exert authority over utility sales and transfers and decline to issue the requested declaratory ruling. The administrative record in a declaratory ruling proceeding includes the petition and a statement of matters officially noticed. Admin. R. Mont. 1.3.227(4).

4. A petition for declaratory ruling must include the following, pursuant to Admin. R. Mont.1.3.227(2): (a) the name and address of the petitioner, (b) a detailed statement of the facts upon which petitioner requests the agency base its ruling, (c) sufficient facts to show that petition will be affected by the requested ruling, (d) the rule or statute for which petition seeks a declaratory ruling, (e) questions presented, (f) propositions of law asserted by the petitioner, (g) the specific relief requested, and (h) the name and address of any person known by petitioner to be interested in the requested declaratory ruling.

5. The Application includes: (a) the name and address of each Applicant, Pt.'s App. ¶ 10 (July 30, 2013); (b) a detailed statement of facts upon which petitioner requests the agency base its ruling, Pt.'s App. ¶¶ 1-8 (July 30, 2013); (c) sufficient facts to show that the Applicant will be affected by the requested ruling, Pt.'s App. ¶¶ 1-8 (July 30, 2013); (f) propositions of law asserted by the petitioner, Pt.'s App. ¶¶ 1-8 (July 30, 2013); and (g) the specific relief requested. Pt.'s App. ¶¶ 8, 19 (July 30, 2013).

6. With regard to requirement (d), the rule or statute for which petitioner seeks a declaratory ruling, the Applicants solely mentioned Title 69 of the Montana Code Annotated, without reference to a specific section. For the purposes of this Order, the Commission assumes that Applicants seek a declaratory ruling regarding Mont. Code Ann. §§ 69-3-102, 69-3-110(1), 69-3-201.

7. Concerning requirement (e), questions presented, the Applicants did not clearly request that the Commission answer any questions.

8. With respect to (h), the name and address of any person known by the petitioner to be interested in the requested declaratory ruling, the Applicants failed to mention the MCC. The Commission finds that the Applicants could have anticipated that Devon's employees and customers would be interested as well.

9. The Commission restates the relevant purported facts as follows:

a. Havre Pipeline is a public utility regulated by this Commission. Havre Pipeline owns and operates a natural gas pipeline system traversing Hill, Blaine, and Choteau counties, Montana.

b. Havre Pipeline is managed by Devon Energy Production Company, L.P., an affiliate of Devon.

c. Devon owns an 82.2% membership interest in Havre Pipeline. Devon is not a public utility.

d. NorthWestern is a public utility regulated by this Commission. NorthWestern is the primary electric and natural gas utility in Montana.

e. On May 23, 2013, Devon and NorthWestern entered into an agreement whereby Devon will sell its 82.2% membership interest in Havre Pipeline to NorthWestern.

f. The Applicants state that the transaction will have no impact on Havre Pipeline's continued operations. Pt.'s App. ¶ 6 (July 30, 2013).

g. Havre Pipeline will continue to provide the same services pursuant to the rules and regulations set by this Commission, and will continue to be a regulated utility. Pt.'s App. ¶ 6 (July 30, 2013).

10. The Commission restates the Applicants relevant assertions of law as follows:

a. Title 69 does not address whether Commission approval is required for the transaction between Devon and NorthWestern, because

Devon is an unregulated entity and because Havre Pipeline is not selling any utility assets. Pt.'s App.¶ 7 (July 30, 2013).

b. The Commission has previously acknowledged that it does not have explicit statutory jurisdiction over the sales of public utilities. Pt.'s App.¶ 8 (July 30, 2013).

c. Neither the Montana Legislature nor any Montana Court has established that the Commission possesses the implicit authority over sales and transfers of utilities that it claims. Pt.'s App.¶ 8 (July 30, 2013).

d. The Commission has never been presented with facts similar to those in this docket, specifically, the transfer by an unregulated corporation of a partial ownership interest in a regulated public utility to another regulated public utility. Pt.'s App.¶ 8 (July 30, 2013).

e. The Applicants do not believe the Commission has jurisdiction over the sale of Havre Pipeline by Devon to NorthWestern. Pt.'s App.¶ 6 (July 30, 2013).

11. The Commission is not required to issue a declaratory ruling, but if it declines to do so it must provide a statement of reasons. Order No. 6017a at ¶ 15, *In the Matter of the Complaint by Colstrip Energy Limited Partnership against the Montana Power Co.*, Docket No. D97.7.127 (December 16, 1997), citing Mont. Code Ann. § 2-4-501 and Admin. R. Mont. 1.3.228(2). "The criteria for deciding whether to issue a declaratory ruling are not defined precisely in Montana law; but the Commission believes it has considerable flexibility, taking into account the underlying purpose for declaratory rulings and sound administrative practice, when deciding whether to issue a declaratory ruling." *Id.*

12. The Commission has been granted express authority to supervise, regulate, and control public utilities. Mont. Code Ann. § 69-3-102. Implicit in this grant of authority is the Commission's power to exercise authority over mergers, sales, and transfers of regulated utilities and utility property. The Commission has a long history of asserting this implied power. Because the Commission may "do all things necessary and convenient" in order to exercise the authority conferred by section 69-3-102, the Commission interprets the statute as bestowing implied authority to review and approve mergers, sales, and transfers of regulated utilities. Mont. Code Ann. § 69-3-103.

13. The Montana Supreme Court has stated that "an administrative agency's interpretation of a statute under its domain is presumed to be controlling," and "the construction of a statute by the agency responsible for its execution should be followed unless there are compelling indications that the construction is wrong." *Christenot v. State*, 272 Mont. 396, 401, 901 P.2d 545 (September 7, 1995). Here the Commission's construction controls in the absence of compelling indications to the contrary. The Commission's longstanding past practices and specific power to "do all things necessary and convenient" support the Commission's interpretation that it has the implied ability to exercise authority of mergers, sales, and transfers.

14. The Commission has, in an abundance of previous dockets, exercised its authority over mergers, sales, and transfers of utilities and utility property. See Order No. 7149c at ¶ 19, *In the Matter of the Consolidated Petition by Mountain Water Company for Declaratory Rulings and Application for Approval of Sale and Transfer of Stock in Park Water Company*, Docket No. D2011.1.8 (September 14, 2011). The Montana Supreme Court has found that a utility may not abandon service without the Commission's consent. *Great Northern Ry. v. Board of R.R. Comm'rs*, 130 Mont. 250, 252, 298 P.2d 1093 (May 10, 1956). This Commission has asserted in the past, and reaffirms now, that the transfer of a utility's assets is a cessation or abandonment of service. Order No. 7149c at ¶ 20, *In the Matter of the Consolidated Petition by Mountain Water Company for Declaratory Rulings and Application for Approval of Sale and Transfer of Stock in Park Water Company*, Docket No. D2011.1.8 (September 14, 2011).

15. This Commission employs three standards when reviewing transfers and sales of public utilities. These standards include: the public interest standard, the no-harm to consumers standard, or the net-benefit to consumers standard. Order No. 6754e at ¶ 20, *In the Matter of the Joint Application of NorthWestern Corp. and Babcock & Brown Infrastructure Limited*, Docket No. D2006.6.82 (August 1, 2007).

16. The Applicants argued that the transaction between Devon and NorthWestern will have no impact on Havre Pipeline's continued operations. Pt.'s App.¶ 6 (July 30, 2013). The Applicants also stated that the Commission has never been presented with a similar transaction. Pt.'s App.¶ 8 (July 30, 2013). However, this Commission asserts that the above entitled docket is similar to the many dockets involving mergers, sales, and transfers that the Commission has reviewed.

17. In 2011, Mountain Water Company requested a declaratory ruling, arguing that because the transaction at hand involved the sale of the parent company's stock, as opposed to Mountain Water Company's stocks or assets, the Commission lacked jurisdiction. *In the Matter of the Consolidated Petition by Mountain Water Company for Declaratory Rulings and Application for Approval of Sale and Transfer of Stock in Park Water Company*, Docket No. D2011.1.8 (September 14, 2011). The Commission did not find this argument persuasive and asserted jurisdiction over the transaction.

18. The sale and transfer of ownership interest in Havre Pipeline from Devon to NorthWestern results in a change in control of Havre Pipeline, a regulated utility within the Commission's jurisdiction. Changes in Havre Pipeline operations will directly impact consumers, employees, and the community at large. Havre Pipeline could be significantly impacted by this transaction.

19. The Commission's authority over sale and transfers of assets or utilities can be inferred from the unique status of public utilities. Public utilities are subject to regulation because they have a duty to provide reasonably adequate service and facilities while charging just and reasonable rates. Mont. Code Ann. §

69-3-201. Regulation is necessary to ensure that this duty is carried out. The Montana Supreme Court made this clear in *Great Northern Utils. Co. v. Public Serv. Comm'n*, 88 Mont. 180, 205, 293 P.294 (May 9, 1930). The Montana Supreme Court's interpretation is in keeping with that of the United States Supreme Court, which has stated that "when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use." *Munn v. Illinois*, 94 U.S. 113, 126 (1877). This Commission endeavors to follow this longstanding principle.

20. The Commission also derives authority over mergers, sales, and transfers from multiple sections of the Montana Code Annotated, which grant the Commission jurisdiction to receive a complaint or to initiate a complaint. Section 69-3-321 states:

"The commission may at any time, upon its own motion, investigate any of the rates, tolls, charges, rules, practices, and services and after a full hearing as provided in this part may make by order such changes as may be just and reasonable, the same as if a formal complaint had been made."

21. The Montana Code Annotated allows the Commission to receive a complaint, or initiate a complaint on its own motion, regarding the acts or practices of public utilities that affect utility service. Montana Code Annotated § 69-3-330(3) states that in order to respond to complaints the Commission may "substitute therefor other regulations, measurements, practices, services, or acts and make such order relating thereto as is just and reasonable." The sale or transfer of a utility or its assets is clearly an act or practice by a utility. The Commission has the ability to investigate, hold a hearing on, and respond to such acts, as implied from the statute.

22. "Pursuant to its authority, the Commission has jurisdiction over and must approve any sale or transfer of a public utility, its assets, or utility obligations in order to assure generally that utility customers will receive adequate service and facilities, that utility rates will not increase as a result of the sale or transfer, and that the acquiring entity is fit, willing, and able to assume the service responsibilities of a public utility." Order No. 6907b at ¶ 6, *In the Matter of the Joint Application of Energy West Incorporated and Cut Bank Gas Company*, Docket No. D2008.3.27 (November 2, 2009). The jurisdiction of the Commission over the sale and transfer of Devon's ownership interest in Havre Pipeline to NorthWestern is based on Havre Pipeline's status as a regulated utility.

23. The proper subject of a declaratory ruling is the applicability of any statutory provision, rule, or of any rule or order of the agency. Mont. Code Ann. § 2-4-501. An agency decision to not exercise jurisdiction is not within the statutory area for declaratory rulings.

Conclusions of Law

The Commission may deny a petition for a declaratory ruling. Mont. Code Ann. § 2-4-501, Admin. R. Mont. 1.3.228.

Order

For the reasons stated above, the Commission declines to issue a declaratory ruling as requested by Applicants Devon and Havre Pipeline.

DONE AND DATED this 29th day of October, 2013, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

/s/W.A. (BILL) GALLAGHER
W.A. (BILL) GALLAGHER
Chairman

/s/BOB LAKE
BOB LAKE
Vice Chair

/s/ KIRK BUSHMAN
KIRK BUSHMAN
Commissioner

/s/TRAVIS KAVULLA
TRAVIS KAVULLA
Commissioner

/s/ROGER KOOPMAN
ROGER KOOPMAN
Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)

NOTE: Petitioner has the right to appeal the decision of this agency by filing a petition for judicial review in district court within 30 days after service of this decision. Judicial review is conducted pursuant to §16-4-411, MCA.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 4th day of November 2013, a true and correct copy of the foregoing has been serviced by placing the same in the United States Mail, postage prepaid, to the service list in the PSC's master file which can be viewed at 1701 Prospect Avenue, Helena, MT 59601.

/s/Aleisha Solem
PSC Paralegal-Commission Secretary